

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division

MARGARET M. AARON,

Plaintiff,

v.

KROGER LIMITED PARTNERSHIP I,

Defendant.

CIVIL CASE NO.  
2:10cv00606

TRANSCRIPT OF PROCEEDINGS  
(Jury Trial, Day Three)

Norfolk, Virginia

January 26, 2012

BEFORE: THE HONORABLE ROBERT G. DOUMAR,  
United States District Judge, and a jury

APPEARANCES:

WILSON & MCINTYRE, PLLC  
By: John S. Wilson, Esquire  
Counsel for the Plaintiff

GUYNN, MEMMER & DILLON, P.C.  
By: Victor "Dinny" Skaff, Esquire  
Counsel for the Defendant

## I N D E X

ON BEHALF OF THE DEFENDANT:	Direct	Cross	Red.	Rec.
D. Heath	270	284	299	--
V. Harris	300	308	--	--
V. Harris (spoilation proffer)	320	327	--	--
D. Heath (spoilation proffer)	328	330	333	--

## E X H I B I T S

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1           (Following adjournment on January 25, 2012, the  
2 proceedings reconvened at 9:24 a.m. as follows:)

3           THE COURT: In relation to the motion, the Court  
4 finds that the motion for summary judgment should be denied.  
5 It is a very close case, but nonetheless I'm going to deny  
6 the motion for summary judgment and we'll proceed.

7           Is there anything else that has to be done at this  
8 time?

9           MR. WILSON: A very quick housekeeping matter  
10 regarding some exhibits of Mr. Skaff's that I just found out  
11 he's going to put in.

12           In the exhibits there is reference to a lady named  
13 Mrs. Saia, who was a former employee. And she's given a  
14 witness statement, which I object to, of course, as hearsay,  
15 and we would pull that out, and then in two places where her  
16 name is referenced I have redacted it. So he has a clean  
17 copy, just without those references.

18           THE COURT: Is this your understanding, Mr. Skaff?  
19 I don't know what he's talking about.

20           Have you-all agreed on this?

21           MR. WILSON: I think he's agreed to part of it; not  
22 all of it.

23           THE COURT: Well, Mr. Wilson, don't tell me  
24 somebody's agreed to something if they haven't. See if you  
25 you-all can figure it out right now.

1           What is it? Are you making some sort of motion,  
2 Mr. Wilson?

3           MR. WILSON: Yes, I'm making a motion in limine that  
4 before he puts in that exhibit in the presence of the jury  
5 that we redact from it references to a person who is not  
6 going to be testifying where she's making statements.

7           THE COURT: Why?

8           MR. WILSON: It's hearsay.

9           THE COURT: Well, let me see whether it's hearsay or  
10 not.

11          MR. WILSON: Okay.

12          THE COURT: Is he trying to present it for the truth  
13 of the matter, or what is it? So what do you contend?

14          MR. WILSON: It is a --

15          THE COURT: You know, you --

16          MR. WILSON: It's a --

17          THE COURT: You're denying Mr. Skaff the opportunity  
18 to present something, Mr. Wilson, so let me hear from  
19 Mr. Skaff.

20               What are you seeking to introduce that Mr. Wilson  
21 seems to anticipate at this time that is not -- what do you  
22 want to introduce?

23          MR. SKAFF: Well, Your Honor, as part of the  
24 testimony of the store manager who took some incident reports  
25 following the accident, there's a series of reports that he

1 took. One of the reports is a supplemental witness statement  
2 prepared by a woman by the name of Linda Saia. In that  
3 report Ms. Saia says, basically, what she saw, heard or  
4 witnessed about the accident, and part of it is some  
5 statements that were made by Mrs. Aaron about the cause of  
6 the fall.

7 And, so --

8 THE COURT: Why is that admissible?

9 MR. SKAFF: Well, Your Honor, number one, it's a  
10 party admission. Number two, it's a business record.

11 I mean, I think the evidence will show that this was  
12 a document that was prepared in Kroger's regular course of  
13 business, it was prepared at or near the time of the fall,  
14 and it's been kept in the regular course of business since  
15 that time.

16 Ms. Saia -- for the Court's information, Ms. Saia is  
17 very ill with cancer. She's undergoing chemotherapy  
18 treatments.

19 THE COURT: I'm not worried about what she's doing.  
20 You had an ample opportunity to take her deposition. If you  
21 didn't, Mr. Skaff, I can't help that.

22 My problem is that you're now saying you're going to  
23 introduce business records. Now, generally business records  
24 are admissible; however, I don't know whether this is a  
25 business record or not. In the course of business you can

1 admit that.

2 All right, Mr. Wilson, what do you say about it?

3 MR. WILSON: The bottom of the very document states,  
4 "This report is being prepared in anticipation of litigation  
5 under the direction of legal counsel. It is confidential and  
6 is not to be released."

7 THE COURT: Thank you. Thank you, Mr. Wilson.  
8 You're quite correct. In that case, it's not an ordinary  
9 business record.

10 MR. WILSON: It was prepared for litigation. She's  
11 not here. If she wants to testify --

12 THE COURT: I heard, you Mr. Wilson.

13 MR. SKAFF: Your Honor, this -- I mean, this is an  
14 interesting issue, and it's an interesting point he makes,  
15 because I think if this were a discovery dispute the argument  
16 would be quite the opposite because he would be saying, "They  
17 do this in every case where there's an incident, and,  
18 therefore, it's really not prepared in anticipation of  
19 litigation, and, therefore, I should get a copy." That's why  
20 we turn it over.

21 So I don't think that has anything to do with --

22 THE COURT: Well, who put that mess on the bottom?

23 MR. SKAFF: Excuse me?

24 THE COURT: Who put that mess on the bottom?

25 MR. SKAFF: I guess Kroger Corporate does, Your

1 Honor.

2 THE COURT: Oh, they did?

3 MR. SKAFF: I guess so. I don't know.

4 THE COURT: Well, I think Mr. Wilson's position is  
5 well taken. I'm sorry, Mr. Skaff.

6 MR. SKAFF: Yes, sir, no -- just please note our  
7 objection for the record.

8 THE COURT: All right. Your objection is noted.

9 However, I'm assuming that Mr. Wilson will agree in  
10 relation to that so we don't have to go into the evidence;  
11 that is, that that record, according to Kroger's testimony or  
12 the man's testimony, would have been that they keep that in  
13 the regular course of business.

14 Do you agree to that, Mr. Wilson?

15 MR. WILSON: I --

16 THE COURT: Otherwise, I'll have them put it on and  
17 then you can --

18 MR. WILSON: He's going to put the exhibit --

19 THE COURT: -- you can make your objection then.

20 MR. WILSON: I'm not objecting. That's the whole  
21 point. I'm not objecting. He can put the exhibit in. I  
22 just want to have one page taken out, and he can put the rest  
23 of it in, and I don't object. If he wants to say it's a  
24 business record, that will be their testimony. I have no  
25 reason to disbelieve that that would be their testimony.

1           THE COURT: That's what I'm saying. Otherwise, I'm  
2 going to let him make his offer of proof, and then you have  
3 to object just like you should. You're doing it very wisely  
4 now, and the only reason I'm allowing you to do that is  
5 because you agree that they would have shown that it was a  
6 business record, that it's done in every case where somebody  
7 falls, and they keep a record of what happens.

8           MR. WILSON: I have no reason to dispute that  
9 statement, and, therefore, I agree with it.

10          THE COURT: I'm not asking you to dispute the  
11 statement. I'm not asking that, Mr. Wilson.

12          Do you agree that the testimony would show that they  
13 keep these records in every single case in which an incident  
14 occurs, whether there's a lawsuit or not?

15          MR. WILSON: I agree that that's what they would  
16 testify.

17          THE COURT: That the manager would so testify. Is  
18 that correct?

19          MR. WILSON: Yes.

20          THE COURT: Okay.

21          MR. SKAFF: Your Honor, one other issue. And, so,  
22 we will not put in that document, and we will redact her name  
23 out of the other -- out of the other documents.

24          THE COURT: What is the -- what is the other  
25 document?



1 MR. SKAFF: Well, there's a series --

2 THE COURT: I'm not ruling -- I'm only ruling on her  
3 statement.

4 MR. SKAFF: I understand, Your Honor, and I just  
5 wanted to make clear -- and Mr. Wilson and I talked about  
6 it -- if she was not -- if that -- if that document was not  
7 allowed to come into evidence that her name would be redacted  
8 out of the other documents that will come in.

9 THE COURT: Why -- okay. They'll come out, then.

10 MR. SKAFF: Okay. Your Honor, one other issue from  
11 a housekeeping standpoint that we wanted to alert the Court  
12 to.

13 At some point today we would like the opportunity to  
14 proffer evidence as it relates to the spoliation issue.

15 THE COURT: Oh, certainly.

16 MR. SKAFF: Okay.

17 THE COURT: I'll allow you to do that.

18 MR. WILSON: Thank you, Judge. And we can do it in  
19 any way you'd like, if that would be out of your presence or  
20 however you'd like us --

21 THE COURT: No, nothing is done out of my presence,  
22 Mr. Skaff. I want you to proffer it while I'm here so I know  
23 what you're proffering, because I want you to do it before we  
24 rest this case, okay?

25 MR. SKAFF: Yes, sir.

1           THE COURT: I don't want to get blindsided. So you  
2 can do it this morning, if you like, right now.

3           MR. SKAFF: Well, if the Court -- if it pleases the  
4 Court, I would prefer, probably, to do it after. These  
5 witnesses I have -- I have two witnesses that aren't going to  
6 take very long --

7           THE COURT: All right. Let's go.

8           MR. SKAFF: -- and then we can do that.

9           THE COURT: Okay. Is the jury here?

10          THE CSO: Yes, sir.

11          THE COURT: All right. Bring them in.

12          (The jury entered the courtroom.)

13          THE COURT: You may be seated.

14          Good morning, ladies and gentlemen.

15          Let the record reflect the entire jury has returned.

16          All right. You're going to proceed with your case,  
17 Mr. Skaff?

18          MR. SKAFF: Yes, sir. We would call Dale Heath at  
19 this time.

20          (The witness was sworn by the clerk.)

21          DANIEL DALE HEATH, called as a witness, having been  
22 first duly sworn, testified as follows:

23                                 DIRECT EXAMINATION

24 BY MR. SKAFF:

25 Q. Good morning.

1 A. Good morning.

2 Q. Could I get you to state your full name, please?

3 A. Daniel Dale Heath.

4 Q. And, Mr. Heath, are you currently employed?

5 A. Yes.

6 Q. And where are you employed?

7 A. Kroger in Charlottesville.

8 Q. And how long have you been employed with Kroger,  
9 generally?

10 A. It will be 24 years in August.

11 Q. And how long have you been in a management position?

12 A. Eleven years.

13 Q. At which stores? Various stores, or --

14 A. Yes.

15 Q. And were you the manager of the Shore Drive store at any  
16 point?

17 A. Yes.

18 Q. Okay. During what time periods?

19 A. The end of 2009 through the first part of 2011.

20 Q. And you say you're now in Charlottesville. How did you  
21 get to Charlottesville?

22 A. A promotion.

23 Q. And in your position as a store manager is safety an  
24 important aspect?

25 A. Yes.

1 Q. Explain a little bit about what Kroger's priorities are  
2 as it relates to safety.

3 A. It's part of our creed, our company, I guess, statement,  
4 the safety of associates and customers.

5 Q. Is it very important to Kroger?

6 A. Yes.

7 Q. And what did you do as it relates to store safety,  
8 particularly as it relates to the floors, when you were the  
9 manager at the Virginia Beach store?

10 A. Just regular visual inspections of the floor conditions.

11 Q. And did you have people come in as well?

12 A. Yes.

13 Q. And if you found anything that you determined to be  
14 dangerous or a hazard what would you do?

15 A. Well, if it was a spill or trash on the floor, of course,  
16 you would take care of the spill or the trash. If it was  
17 something more serious then we put it on the service hub, and  
18 Facility Engineering would come in and fix it.

19 Q. Was that done pretty quickly?

20 A. Yes, especially if it's a safety issue.

21 Q. Okay. All right. Let me direct your attention as it  
22 relates to the cement drain cover at issue in this case.

23 You're aware that that's an issue in this case.

24 A. Right.

25 Q. All right. And you were employed, I think you said, at

1 the Shore Drive store for two and a half years.

2 A. Correct.

3 Q. Were you aware of that cement drain cover?

4 A. I had seen it, yes.

5 Q. Okay. And why were you aware of it?

6 A. Just because that's -- the area that it's in is where we  
7 do our seasonal displays, so for the summer we would have  
8 watermelons there, for Halloween we would have Halloween  
9 candy there. So it was right there, you know, in a visible  
10 place.

11 Q. And were you ever -- did you ever run your foot over it  
12 or touch it or anything?

13 A. Yes.

14 Q. And what did you find?

15 A. That it was level.

16 Q. Did you ever run your foot over it -- I'm sorry. Excuse  
17 me.

18 Did you ever determine whether it was raised up above  
19 the floor in any way?

20 A. No. It just looked to me like it was filled in with wax.

21 Q. But was it raised up above the floor in any way?

22 A. No.

23 Q. Okay. Did you ever have any problem seeing where it was?

24 A. No.

25 Q. And on June -- prior to June 3rd of 2010, which is when

1 Mrs. Aaron fell in your store, was it hidden in any way?

2 A. No.

3 Q. Was it hidden in any way on June 3, 2010?

4 A. No.

5 Q. Let me show you the photograph that we have right in  
6 front of you.

7 THE COURT: Mr. Pierce...

8 MR. SKAFF: Mr. Pierce, I'm just going to ask him  
9 one quick question about it.

10 BY MR. SKAFF:

11 Q. Does the photograph shown there accurately depict the way  
12 the store looked on June 3, 2010?

13 A. Yes.

14 Q. Okay. Let me show you the photograph we have behind you  
15 there.

16 THE COURT: What exhibit number is that?

17 (There was a pause in the proceedings.)

18 THE COURT: We can put it in now.

19 MR. SKAFF: It's already into evidence, Your Honor.  
20 I'm just not sure what the --

21 THE COURT: It may be in evidence, but we don't have  
22 a mark on it. I don't know why.

23 THE CLERK: Demonstrative...

24 THE COURT: Well, let's put it in evidence, okay?

25 THE CLERK: It's P 1.

1 THE COURT: It's P 1?

2 THE CLERK: Yes, sir.

3 THE COURT: It's P 1? Or is it P 2? Take a look at  
4 it and --

5 THE CLERK: Yes, that's it. That one on the easel  
6 right now is P 2.

7 THE COURT: Okay. P 1 is the one that Mr. Pierce  
8 has in his hand?

9 THE CLERK: No.

10 MR. SKAFF: P 15, Your Honor, I think is the one  
11 Mr. Pierce is holding.

12 THE CLERK: Yes.

13 THE COURT: P 15?

14 THE CLERK: P 15 is in.

15 THE COURT: All right. That's just a blowup of  
16 P 15?

17 MR. SKAFF: Yes, sir.

18 THE COURT: All right. Mark it P 15.

19 Excuse me. It's just that if we're going to refer  
20 to something I want to make sure it's properly recorded.

21 MR. SKAFF: And this one, I believe, is P 2, Your  
22 Honor.

23 THE COURT: That's P 2?

24 MR. SKAFF: Yes.

25 THE COURT: Mark that P 2. Otherwise, we get into a

1 real problem. P 2 will be both the blow-up as well as the  
2 small one that's been admitted into evidence.

3 Okay? Let's go.

4 BY MR. SKAFF:

5 Q. And, Mr. Heath, let me show you what's been marked as  
6 Exhibit P 2 in the case.

7 Any -- does that accurately depict the way the door  
8 looked on the day, June 3, 2010?

9 A. Yes.

10 Q. As the store manager, are you out on the sales floor on a  
11 regular basis?

12 A. Yes, constantly.

13 Q. When you were there as a store manager how many people do  
14 you think were in and out of that store on a daily basis?

15 A. On a daily basis? 2500, 3,000.

16 Q. Did you ever see anybody have any difficulty walking in  
17 and around that area?

18 A. No, sir.

19 Q. Did you ever have any complaints about anything in or  
20 around that area?

21 A. No.

22 Q. Was anything changed about that particular area after the  
23 fall?

24 A. No.

25 Q. It's still in existence today?



1 A. Yes.

2 Q. At any time was that cement drain cover ever raised as a  
3 safety concern by anyone at Kroger?

4 A. No.

5 Q. All right. Let me direct your attention to June 3, 2010,  
6 the date of Ms. Aaron's fall.

7 Were you working that day?

8 A. Yes.

9 Q. Okay. What were you doing?

10 A. As far -- you know --

11 Q. Well, let me back up. You didn't see Mrs. Aaron fall,  
12 did you?

13 A. No.

14 Q. Okay. How did you first become aware of the fall?

15 A. I was paged to the front over the intercom.

16 Q. And what had you been doing?

17 A. I was on the back dock receiving a truck.

18 Q. And when you arrived what did you see?

19 A. Mrs. Aaron was sitting in a chair, and her shin was  
20 bleeding.

21 Q. Did you speak with her?

22 A. Yes.

23 Q. Okay. And what, if anything, do you recall that she said  
24 to you?

25 A. Just that she didn't know what happened, she didn't see

1 anything in the floor, she didn't know what she tripped over,  
2 and she was apologetic.

3 Q. Did she say anything about how she might have fallen or  
4 tripped and fallen?

5 A. No, just that she didn't know what she fell over.

6 Q. Did she ever point anything out to you about the drain  
7 cover?

8 A. No.

9 Q. Did she ever say anything to you about the drain cover?

10 A. No.

11 Q. And what did you do next?

12 A. Called my administrative assistant, Linda Saia, to get  
13 the first aid kit to see if we could stop the bleeding on her  
14 shin.

15 Q. Okay. Did you do anything else?

16 A. No.

17 Q. You took care of her and made sure she was okay?

18 A. Right.

19 Q. Okay. And then did you do anything else as it related to  
20 the accident?

21 A. Just the next day I had Vernon -- no.

22 Q. Okay. All right. Now, did you later on complete some  
23 reports as it related to this accident?

24 A. Yes.

25 Q. All right. Let me show you a series of documents -- I'd

1 ask that Mr. Pierce had them to you -- and just get you to  
2 take a look through there.

3 (There was a pause in the proceedings.)

4 BY MR. SKAFF:

5 Q. Do you recognize those documents?

6 A. Yes.

7 Q. And what are they?

8 A. Just the incident report that we sent to Sedgewick.

9 Q. You sent to Kroger?

10 A. Yes.

11 Q. Okay. Explain to me what these documents are. What do  
12 you do with these documents?

13 A. Basically, we fill these out as we do our investigation  
14 and then fax them to Sedgewick.

15 Q. Which is a part of Kroger, correct?

16 A. Right.

17 Q. Okay.

18 THE COURT: Was this done in every case?

19 THE WITNESS: Yes.

20 THE COURT: Anytime somebody --

21 THE WITNESS: Yes, an associate or customer.

22 THE COURT: Just kept in the regular course of  
23 business?

24 THE WITNESS: Right.

25 THE COURT: All right. Let's move along.

1 MR. SKAFF: Okay.

2 BY MR. SKAFF:

3 Q. And on the date -- are these your signatures at the  
4 bottom of these documents?

5 A. Yes.

6 Q. Let me go through these a little bit with you.

7 The first one, which is marked as --

8 MR. SKAFF: Let me go ahead at this point and just  
9 move these into evidence as Defendant's 4 through 10.

10 THE COURT: Defendant's Exhibits 4 through 10 are  
11 admitted into evidence.

12 (The exhibits were admitted into evidence.)

13 BY MR. SKAFF:

14 Q. Mr. Heath, let me go ahead and direct your attention to  
15 Exhibit 4 first.

16 That's the customer incident report?

17 A. Yes.

18 Q. Okay. And, now, this document shows that it wasn't  
19 completed until 6-10 of 2010, correct?

20 A. Correct.

21 Q. Which was about a week or so after the accident.

22 A. Correct.

23 Q. Okay. Why was that the case?

24 A. Just the -- the way Mrs. Aaron was acting at the time of  
25 the fall, she said it wasn't our fault; that her husband had

1 recently had heart surgery, and, you know, she just really  
2 didn't want to be a bother.

3 Q. Okay. And, so, what, you didn't complete them at that  
4 time?

5 A. Correct.

6 Q. Okay. And what made you complete them later on?

7 A. A letter from her lawyer.

8 Q. And, so, you found out that she had retained an attorney  
9 within a week of the incident?

10 A. Yes.

11 Q. Okay. And, so, you felt like you had to go ahead and --

12 A. Right.

13 Q. Okay. At any time -- at that point did you realize the  
14 cement drain cover was an issue in the case?

15 A. Not at that time, no.

16 Q. Now, let me point your attention to Exhibit 7 as part of  
17 that packet.

18 Okay. Let me -- is that, again, just another --  
19 that's a supplemental slip/fall incident report?

20 A. Yes.

21 Q. Okay. And that was prepared -- all of these documents  
22 were essentially prepared at the same time?

23 A. Yes.

24 Q. Okay. Let me direct your attention to where it says,  
25 "List any comments made by the customer after the fall."

1           Does that refresh your recollection about anything  
2           that Mrs. Aaron might have said to you after the incident?

3           A.   Yes.   She said she didn't see anything on the floor, so  
4           she must have tripped over her own feet.

5           Q.   Let me direct your attention to what's marked as Exhibit

6           A --

7           THE COURT:   What did she -- let me get back.   I  
8           didn't hear the end of that.   What was the end of that?

9           THE WITNESS:   That she didn't see anything on the  
10          floor, so she must have tripped over her own feet.

11          THE COURT:   Did she say that to you?

12          THE WITNESS:   Yes.

13          BY MR. SKAFF:

14          Q.   Okay.   Now, let me show you what's marked as Exhibit 8.

15                 Is that a diagram that you prepared with regard to  
16          the accident?

17          A.   Yes.

18          Q.   Okay.   Now, that diagram shows that the fall happened  
19          back where she initially -- where she's testified she picked  
20          up her watermelon.   Why did you mark it back there?

21          A.   Just from talking with Ryan Walters, that's where I  
22          thought she was standing at the time of the fall, because  
23          there was nothing else on the floor that I deemed a slip  
24          hazard.

25          Q.   And, based on what she told you at that point, you didn't

1 know what had happened?

2 A. Exactly.

3 Q. Okay. Let me direct your attention to the next document  
4 in line, which is Defendant's Exhibit Number 9.

5 What is that document?

6 A. A floor inspection report.

7 Q. Okay. And what is that document for, and what did you do  
8 there?

9 A. Just -- it's asking when the last time the floor was  
10 inspected, and it was inspected by me at around 1:00 p.m., on  
11 a routine store walk.

12 Q. And you didn't -- what did you not -- what did you see  
13 or not see?

14 A. It was free of debris, no liquid, no trip hazards.

15 Q. And Exhibit 10 -- what is that document?

16 A. Suspicious/questionable incident form.

17 Q. And why did you complete that document?

18 A. Just because they told -- when we go through training  
19 they tell us to fill out as much as possible.

20 Q. And that's just part of the packet?

21 A. Right.

22 Q. And that just, again, talks about what you were told with  
23 regard to the accident?

24 A. Yes.

25 Q. Okay. Did you at any time tell anyone what to put on any

—D. D. Heath - Cross—

1 form or anything like that?

2 A. No.

3 MR. SKAFF: I think that's all I have, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. WILSON:

6 Q. Mr. Heath, good morning.

7 One of your job responsibilities as store manager  
8 included promoting safety awareness and safety standards in  
9 the store?

10 A. Yes.

11 Q. And the store had safety audits on a bimonthly basis?

12 A. Correct.

13 Q. And you had to sign off on those, right?

14 A. Yes.

15 Q. And those were conducted by Mr. Harris and not by you?

16 A. Correct.

17 Q. And the condition of the floor surfaces was part of those  
18 safety audits, right?

19 A. Yes.

20 Q. And the audits covered things like the drain covers, any  
21 unevenness, anything that could possibly be a trip hazard?

22 A. Yes.

23 Q. And you understood that a tripping hazard was anything  
24 that could make someone trip, correct?

25 A. Yes.



—D. D. Heath - Cross—

1 Q. You had looked at the cement drain plug before June 3,  
2 2010?

3 A. Yes.

4 Q. And you rubbed your foot on it?

5 A. Yes.

6 Q. And, based on your visual observation, you concluded that  
7 it was level, right?

8 A. Yes.

9 Q. And, so, do you know in this case whether or not it's  
10 been measured to be not level one way or the other?

11 A. I don't -- I don't.

12 Q. But someone who was in the store who does those routine  
13 inspections that you've described -- and you're all over the  
14 floor -- by visual inspection it was level to you, correct?

15 A. Correct.

16 Q. Okay. You never touched the spot with your hand, though,  
17 did you?

18 A. Just ran my foot across it.

19 Q. You never took any measurements or anything like that?

20 A. No.

21 Q. You don't have any professional licenses, do you?

22 A. No.

23 Q. You mentioned that Kroger has a separate -- I think you  
24 said Facilities Engineering Department.

25 A. Yes.

—D. D. Heath - Cross—

1 Q. And that's where?

2 A. Roanoke.

3 Q. And that's where you have your engineers?

4 A. Yes.

5 Q. From your experience as the store manager, did this  
6 cement spot serve any purpose?

7 A. No.

8 Q. Was it decorative in any way?

9 A. No.

10 Q. And you don't even know why it was there, do you?

11 A. No, I don't.

12 Q. Other areas in the store have brass drain covers, right?

13 A. Yes.

14 Q. This Shore Drive store had a large senior clientele, did  
15 it not?

16 A. It did.

17 Q. And, in fact, you offered a 5 percent senior discount on  
18 Tuesdays?

19 A. Yes.

20 Q. And you posted that prominently on the window?

21 A. Yes.

22 Q. What was the purpose of doing that?

23 A. Just to increase business.

24 Q. Increase senior business?

25 A. Yes.

—D. D. Heath - Cross—

1 Q. In terms of this watermelon display that we've seen,  
2 Kroger decided where to place that watermelon display, right?

3 A. Basically, it's a decision made in store.

4 Q. But I'm saying is it's a decision that that store makes,  
5 as opposed to a vendor who comes in and says, "I want to put  
6 my watermelons here."

7 A. Right.

8 Q. And I think you said that this area normally was used for  
9 seasonal or promotional items.

10 A. Yes.

11 Q. And on the store plan would you agree that that area is  
12 shown clear?

13 A. Yes.

14 Q. If you can look at it -- I don't know if you can see it,  
15 sir, and I don't -- it's not a good angle for you, but did  
16 you understand that there was a yellow sign on the box?

17 A. Yes.

18 Q. And what did that mean?

19 A. That's the price of the watermelon.

20 Q. Was it a sales item?

21 A. Yes.

22 Q. And, so, the purpose was to draw people over to that  
23 area?

24 A. Yes.

25 Q. You have no personal knowledge as to how the fall

—D. D. Heath - Cross—

1 occurred?

2 A. I don't.

3 Q. Looking at one of the exhibits which has previously been  
4 marked as Plaintiff's 1, I'd ask you one question.

5 After Mrs. Aaron had fallen do you see the initials  
6 "WM" with an X there, down at the bottom?

7 A. Yes.

8 Q. And was it your understanding that's where the watermelon  
9 had landed?

10 A. Yes.

11 Q. And after her fall it's my understanding that you went  
12 and conducted a very thorough examination of that area all  
13 around the watermelon display, right?

14 A. Right.

15 Q. And when you did that did you find any debris -- I mean,  
16 putting the watermelon aside.

17 A. No.

18 Q. Was the watermelon displayed in any -- the watermelon  
19 that broke, was that where Mrs. Aaron fell, or did she throw  
20 that forward?

21 A. It looked like she had thrown it forward.

22 Q. Okay. And, so, when you looked in the area where you  
23 thought she had fallen there was nothing there, as far as you  
24 could tell.

25 A. Right.

—D. D. Heath - Cross—

1 Q. But the cement drain plug was there, wasn't it?

2 A. Yes.

3 Q. When you first went to Mrs. Aaron she was sitting in a  
4 chair?

5 A. Yes.

6 Q. Do you know how she got in the chair?

7 A. From what I was told, I think a customer brought it over.

8 Q. All right. Other than that, you don't know -- you don't  
9 have any personal knowledge?

10 A. No.

11 Q. Were you aware that Mrs. Aaron was hurt?

12 A. Just -- I -- that her shin was bleeding.

13 Q. When you say "her shin" was it actually on the outside of  
14 her leg?

15 A. Yeah. It was her right leg, I believe.

16 Q. On the outside near the shin?

17 A. Right.

18 Q. Okay. And I think you said that you tended to her.

19 A. Yes.

20 Q. And as you tended to her were you able to stop the  
21 bleeding?

22 A. After a while. It seemed like maybe she was on blood  
23 thinners, and it was -- it was hard to get it to stop  
24 bleeding.

25 Q. When you inspected the area after her fall did you see

—D. D. Heath - Cross—

1     what she had cut her leg on?

2     A.   I did not.

3     Q.   Now, we talked about the incident report that you  
4     prepared, and I'd ask you to look at that.

5             THE COURT:   Which number is it?

6             MR. WILSON:   Your Honor, this was Defendant's  
7     Exhibits 4 through 10, with the exception of Number 6, which  
8     we discussed earlier.

9     BY MR. WILSON:

10    Q.   Do you have a copy of that in front of you, sir?

11    A.   Yes.

12    Q.   Okay.   Now, you prepared that incident report after you  
13    had received an attorney letter, correct?

14    A.   Correct.

15    Q.   And at the bottom of it it says, "This report is being  
16    prepared in anticipation of litigation under the direction of  
17    legal counsel."

18             Do you see that?

19    A.   Yes.

20    Q.   Okay.   And when you were preparing this you had already  
21    been put on notice of a claim, and then you were preparing  
22    sort of -- I guess you were filling out the form accordingly.

23    A.   Right.

24    Q.   Now, if you would look, please, at the first page, which  
25    is, I guess, marked as Number 4.   Do you have that?

—D. D. Heath - Cross—

1 A. Yes.

2 Q. And do you see that that date is June 10, down at the  
3 bottom there, sir, the second page?

4 A. Yes.

5 Q. Okay. And, so, that's the date you filled out that form.

6 A. Right.

7 Q. Okay. Now, Counsel brought your attention to what's been  
8 marked as 8, which was the drawing.

9 Do you have that in front of you?

10 A. Yes.

11 Q. Okay. Looking at that drawing, you were asked to place  
12 an X where the fall happened, right?

13 A. Correct.

14 Q. And you didn't witness the fall.

15 A. Right.

16 Q. Ryan Walters did.

17 A. Yes.

18 Q. And Ryan Walters -- you never asked him to see if you had  
19 actually put the X in the right place, did you?

20 A. No, I didn't.

21 Q. And, in fact, where you put that X -- that was behind the  
22 watermelon bin, right?

23 A. Right.

24 Q. As opposed to just coming around the corner where that  
25 cement drain plug was, right?

—D. D. Heath - Cross—

1 A. Right.

2 Q. Okay. So you had the wrong location.

3 A. Yes.

4 Q. Now, if you look, please, again going back to Number 4,  
5 if you don't mind, it talks about witnesses on page 2.

6 Do you see that, "Potential Witnesses"?

7 A. Yes he.

8 Q. And do you see that differentiates between store  
9 employees and nonemployees?

10 A. Yes.

11 Q. When Mrs. Aaron got hurt were there other customers in  
12 the store?

13 A. There was.

14 Q. And on that date did you try to contact or interview any  
15 customers to see what they had seen?

16 A. I did not.

17 Q. Did you expect that once the shoppers left that day that  
18 you would have difficulty tracking them down?

19 A. Honestly, it didn't even cross my mind.

20 Q. Okay. Then if you would continue down a little bit  
21 further it says, "Were witness statements taken?"

22 Do you see that?

23 A. Yes.

24 Q. And you indicated "Yes," and you gave two. And was one  
25 of the witness statements that was taken that of Mr. Walters?



—D. D. Heath - Cross—

1 A. Yes.

2 Q. And you'll see that marked as Exhibit 5.

3 THE COURT: Mr. Wilson, you're treading on thin ice.  
4 Approach the bench.

5 (The following was heard at the sidebar out the  
6 hearing of the jury:)

7 THE COURT: You're opening Pandora's box when you  
8 start talking about witness statements that were taken and  
9 who was taken and who wasn't taken, and you're going to end  
10 up with the lady's statement coming into evidence.

11 MR. WILSON: This is already in evidence; not the  
12 other one. I'll move on.

13 THE COURT: Do you understand what I'm saying to  
14 you, Mr. Wilson?

15 MR. WILSON: I do.

16 THE COURT: I'm trying to warn you.

17 MR. WILSON: I've got you.

18 THE COURT: Have you got the warning?

19 MR. WILSON: Yes, sir. I'll leave that one alone.

20 (The proceedings resumed in open court as follows:)

21 BY MR. WILSON:

22 Q. Mr. Heath, look, please, at what's been marked as  
23 Exhibit 7.

24 Do you have that?

25 A. Yes.

—D. D. Heath - Cross—

1 Q. And where it asks about the type of flooring in this area  
2 you said, "slip-resistant tile"?

3 A. Yes.

4 Q. You never mentioned the cement drain plug that was the  
5 anomaly in the slip-resistant tile area, right?

6 A. Correct.

7 Q. And then you -- at that time did you make notes that  
8 Mrs. Aaron was wearing white Sketchers?

9 A. Yes, slip-on shoes.

10 Q. And you said "without a back on them."

11 A. Yes.

12 Q. And if I could ask that we perhaps show those shoes to  
13 you.

14 (There was a pause in the proceedings.)

15 BY MR. WILSON:

16 Q. And, sir, those aren't white Sketchers, are they?

17 A. No, but --

18 Q. Okay. And they do have a back on them.

19 A. Not really.

20 Q. Okay. Are those the shoes that you remember?

21 A. To the best of my recollection, yes.

22 Q. Okay. Now, when --

23 THE COURT: I didn't understand. Are these the  
24 shoes you saw, or are they different shoes that you saw.

25 THE WITNESS: To the best of my recollection, they

—D. D. Heath - Cross—

1 are the shoes.

2 THE COURT: Okay.

3 BY MR. WILSON:

4 Q. Now, Mr. Heath, I wanted to ask you when you spoke with  
5 Mrs. Aaron after the fall you didn't know that she had broken  
6 her pelvis at that time, right?

7 A. No.

8 Q. And is it fair to say that you didn't realize the  
9 seriousness of her condition?

10 A. Correct.

11 Q. When you were talking with her -- you don't have any  
12 specialized medical training do you?

13 A. No.

14 Q. And you wouldn't know if someone were in shock?

15 A. No.

16 Q. When you were talking with her did she seem shaken up to  
17 you?

18 A. A little, yeah. Average, yes.

19 Q. And was she sort of rambling a bit?

20 A. A little bit.

21 Q. When you were with Mrs. Aaron before the paramedics  
22 arrived was she embarrassed by the attention?

23 A. Yes.

24 Q. And she said she was sorry to be a bother?

25 A. Yes.

—D. D. Heath - Cross—

1 Q. And did she also tell you that she wanted to avoid  
2 calling her husband directly?

3 A. Yes.

4 Q. And did she say why?

5 A. Because he had just had heart surgery.

6 Q. And she didn't want to upset him?

7 A. Correct.

8 Q. Now, earlier when Mr. Skaiff asked you what you recalled  
9 her saying I thought you said that she said, "I didn't know  
10 what happened," right?

11 A. Right. She said, "I didn't know what I tripped over."

12 Q. Okay. And then when he was giving you this document that  
13 was prepared in anticipation of litigation --

14 A. Uh-huh.

15 Q. -- that refreshed your memory in terms of some other  
16 things that you thought about, right?

17 A. Yes.

18 Q. You selected what to put in this report, did you not, in  
19 terms of statements?

20 A. Yes.

21 Q. Because you didn't mention things about her husband with,  
22 you know, the heart condition, and whether or not she wanted  
23 to call an ambulance and things like that, correct?

24 A. Correct.

25 Q. So you selected what to put in here, correct?

—D. D. Heath - Cross—

1 A. Yes.

2 Q. And when you were doing that did you understand at the  
3 time that you might be using this document in court in order  
4 to provide some detail to the jury?

5 A. Yes.

6 Q. And you did that because you were preparing this in the  
7 anticipation of litigation.

8 A. Yes.

9 Q. Now, look at what you said on Exhibit 4, and tell me if  
10 I'm reading this correctly.

11 "Mrs. Aaron repeatedly told us she fell on her own  
12 and didn't trip over anything." Do you see that?

13 A. Yes.

14 Q. And then, if you wouldn't mind, would you please look at  
15 Exhibit 7. And this time you say that she said, "I tripped  
16 over my own feet."

17 A. Yes.

18 Q. Okay. So on June 10, when you prepared Exhibit 4, you  
19 were told she said, "I didn't trip over anything," and on  
20 June 11 you said that she tripped over her own feet.

21 A. Correct.

22 Q. All right. And then --

23 THE COURT: That's what she said, not what he said.  
24 Is that what she said?

25 THE WITNESS: To the best of my recollection, yes.

—D. D. Heath - Cross—

1 BY MR. WILSON:

2 Q. And, sir, then if you would look, please, at Exhibit 10,  
3 now -- well, first of all, this is called a supplemental  
4 questionable/suspicious incident form.

5 A. Uh-huh.

6 Q. And do you fill that form out for every fall?

7 A. Yeah.

8 Q. So, from Kroger's perspective, every time someone falls  
9 it's questionable or suspicious?

10 A. Or supplemental.

11 Q. And this supplemental questionable --

12 THE COURT: Asked and answered. Move along,  
13 Mr. Wilson.

14 MR. WILSON: Okay.

15 BY MR. WILSON:

16 Q. Mr. Heath --

17 THE COURT: Sometimes you just keep going.

18 BY MR. WILSON:

19 Q. Mr. --

20 THE COURT: Let's move along.

21 BY MR. WILSON:

22 Q. Mr. Heath, when you look at what you describe what  
23 Mrs. Aaron told you in this particular document, now it says,  
24 "She repeatedly told us she tripped over her own feet and it  
25 was not our fault but hers."

—D. D. Heath - Redirect—

1 A. Correct.

2 Q. So we sort of get the progression from didn't trip --

3 THE COURT: Don't make any comments, Mr. -- you can  
4 argue your case at the end of the trial, Mr. Wilson.

5 MR. WILSON: Okay. That's all, then. I have no  
6 further questions for you.

7 THE COURT: Any redirect, Mr. Skaff?

8 MR. SKAFF: Yes, Your Honor, just a couple of  
9 things.

10 REDIRECT EXAMINATION

11 BY MR. SKAFF:

12 Q. Mr. Heath, I just want to be clear.

13 Did you in any way alter or prepare these reports  
14 differently than your recollection of what happened on the  
15 day of the accident because there had been some letter from  
16 an attorney?

17 A. No.

18 Q. Did you -- were you aware -- did you have any knowledge  
19 of any specific customers that had ever seen what happened?

20 A. No.

21 Q. Mr. Wilson asked you some questions about why -- you  
22 know, about putting slip-resistant tile on the forms as  
23 opposed to not -- and also not putting the cement drain plug  
24 on there. Why was that?

25 A. At that time I didn't realize that the drain plug was an

—V. E. Harris - Direct—

1 issue.

2 Q. Did you ever realize that it could be an issue?

3 A. Not at that time.

4 MR. SKAFF: Okay. All right. That's all I have,  
5 Your Honor.

6 THE COURT: Anything else, Mr. Wilson?

7 MR. WILSON: No, Your Honor.

8 THE COURT: You're instructed not to discuss your  
9 testimony with anyone until this case is complete, at which  
10 time you're free to discuss it with anyone you like. You may  
11 step down.

12 Who is your next witness, Mr. Skaff?

13 MR. SKAFF: We would call Mr. Vernon Harris, Your  
14 Honor.

15 (The witness was sworn by the clerk.)

16 VERNON ELDRIDGE HARRIS, called as a witness, having  
17 been first duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MR. SKAFF:

20 Q. Good morning.

21 A. Good morning.

22 Q. Could I get you to state your full name, please.

23 A. Vernon Eldridge Harris.

24 Q. Mr. Harris, are you currently employed?

25 A. Yes, sir.



—V. E. Harris - Direct—

1 Q. Where?

2 A. Kroger's.

3 Q. And what do you do for Kroger?

4 A. I'm a loss prevention specialist.

5 Q. And how long have you been there?

6 A. Thirteen years.

7 Q. Are you assigned to a specific store, or --

8 A. I cover seven stores.

9 Q. And in your job in loss prevention what do you do as it  
10 relates to store safety, focusing particularly on the floors  
11 of the stores?

12 A. Safety inspections, date inspections, check about the  
13 dates, safety concerns, you know, fire inspections, make sure  
14 fire doors are sealed.

15 Q. And as part of your safety inspection as it relates to  
16 floors do you go around and look at the floors?

17 A. Yes, sir.

18 Q. And what are you looking for when you do that?

19 A. Cracks, any tiles that are peeled up, carpet that's torn,  
20 rugs that might be misplaced, out of place.

21 Q. And if you see anything like that what do you do about  
22 it?

23 A. I have an audit I fill out, and I also tell the store  
24 manager and send it through the e-mail to the corporate  
25 headquarters.

—V. E. Harris - Direct—

1 Q. Does Kroger take care of that pretty quickly?

2 A. Yes, sir. They put it on what's called a hub, and  
3 Maintenance comes out and takes care of that.

4 Q. Let me talk to you about this cement drain cover that  
5 you're aware of, that's pictured just to the right of the  
6 watermelon display.

7 You're aware of what I'm speaking of, correct?

8 A. Yes, sir.

9 Q. Okay. In your position, had you become aware of this  
10 cement drain cover prior to June 3 of 2010?

11 A. Yes, sir.

12 Q. And how and why?

13 A. It's been there since they did a remodel back in 2000 --  
14 1999, 2000.

15 Q. And when they did that remodel was there any kind of  
16 inspection or anything done?

17 A. Yeah. Every time a part of a remodel is done it gets  
18 inspected.

19 Q. By whom?

20 A. By the city and also by Kroger.

21 Q. Okay. And did that pass all those inspections?

22 MR. WILSON: Your Honor, I would object to the  
23 hearsay for part of the inspection and that Kroger --

24 THE COURT: Objection overruled. Continue.

25 BY MR. SKAFF:

—V. E. Harris - Direct—

1 Q. To your knowledge, did the floor at issue pass those  
2 inspections?

3 A. To the best of my knowledge, it did.

4 Q. Okay. Now, have you ever touched that specific spot or  
5 anything?

6 A. Quite often.

7 Q. Okay. And what do you notice about it?

8 A. Really, nothing. It's -- there's just one little spot  
9 that's like a little divot the size of a pencil head. Other  
10 than that, it's pretty -- fairly flat.

11 Q. Do you ever have any problems seeing it?

12 A. No, sir.

13 Q. Prior -- or -- where is your office based out of?

14 A. It's on the opposite side of the produce entrance. It's  
15 on the far side of the building.

16 Q. So while you work out of seven stores, is your office  
17 based out of this particular store?

18 A. Yes, sir.

19 Q. Okay. So have you -- in the times that you've gone in  
20 and out that store did you ever have any problem seeing that  
21 spot?

22 A. No, sir.

23 Q. Was it ever -- prior to June 3 of 2010, was it hidden in  
24 any way?

25 A. No, sir.

—V. E. Harris - Direct—

1 Q. On June 3, 2010, was it hidden in any way?

2 A. No, sir.

3 Q. In your store life and in your discussions with Kroger  
4 and all that sort of thing has that ever been identified as  
5 some sort of safety issue?

6 A. No, sir.

7 Q. Are you -- how many people do you believe are in and out  
8 of that store on a regular basis?

9 THE COURT: Unless he knows -- the store manager? I  
10 allowed him to testify to that; not him.

11 Let's move along.

12 MR. SKAFF: Yes, sir.

13 BY MR. SKAFF:

14 Q. Is that a fairly busy store?

15 A. Yes, sir.

16 Q. And have you ever had any complaints about that  
17 incident -- about that spot?

18 A. No, sir.

19 Q. And was anything changed about it after Ms. Aaron's fall?

20 A. No, sir.

21 Q. It still exists today?

22 A. Yes, sir.

23 Q. In the same form?

24 A. Yes, sir.

25 Q. Now, since this incident has occurred have you had the

—V. E. Harris - Direct—

1 opportunity to go out and inspect it?

2 A. Yes, sir.

3 Q. And what -- have you measured it?

4 A. Yes, sir.

5 Q. How did you measure it?

6 A. With a ruler, a stick ruler.

7 Q. Okay. And what -- what do you -- what do you -- have you  
8 seen in terms of measurements? What did you find out?

9 A. It's -- like I said, it's got an eighth-of-an-inch like  
10 divot on one edge, about the size of a pencil head. Other  
11 than that, it's fairly flat.

12 Q. And how far across is it?

13 A. It's seven inches across.

14 Q. At no point -- is it raised above the floor at any point?

15 A. No, sir.

16 Q. Aside from that one little pencil spot that you  
17 mentioned, is that -- is it flush with the floor?

18 A. Yes, sir.

19 Q. That you're -- according to your inspections?

20 A. Yes, sir.

21 Q. Okay. Let me ask you a quick question about the floor,  
22 if you know.

23 The tiles on the floor, are they a specific  
24 measurement?

25 A. Yeah, they're a foot by a foot.

—V. E. Harris - Direct—

1 Q. Okay. Let me show you a couple of photographs, if I  
2 could, please. The first one would be what we've marked as  
3 Defendant's Exhibit Number 11.

4 Do you recognize that?

5 A. Yes, sir.

6 Q. What is that?

7 A. That's the drain cover.

8 Q. And were you present when this photograph was taken?

9 A. Yes, sir.

10 Q. And it was taken after this incident occurred.

11 A. Yes, sir.

12 Q. Does that generally depict the area where the plaintiff  
13 allegedly -- or where she fell, minus the watermelon display?

14 A. Yes, sir.

15 Q. Okay.

16 MR. SKAFF: Your Honor, at this time we would move  
17 into evidence Defendant's Exhibit 11.

18 THE COURT: Defense Exhibit 11 is received in  
19 evidence.

20 (The exhibit was admitted into evidence.)

21 MR. SKAFF: I'm sorry, Your Honor?

22 THE COURT: It was received in evidence.

23 MR. SKAFF: Thank you.

24 BY MR. SKAFF:

25 Q. If I could just show you one more photograph, Mr. Harris.

—V. E. Harris - Direct—

1 This is what we've marked as Defendant's Exhibit Number 12.

2 Can you just -- do you recognize what that is?

3 A. Yes, sir.

4 Q. And what is that?

5 A. That's the drain cover.

6 Q. Just another angle?

7 A. Yes, sir.

8 Q. And were you present when that photograph was taken?

9 A. Yes, sir.

10 Q. And, again, that was taken after this incident occurred?

11 A. Yes, sir.

12 Q. Does that accurately depict the area in question in this  
13 case?

14 A. Yes, sir.

15 MR. SKAFF: Your Honor, we would move into evidence  
16 Defendant's Exhibit Number 12.

17 THE COURT: Number 12 is received in evidence.

18 (The exhibit was admitted into evidence.)

19 BY MR. SKAFF:

20 Q. One final question -- or a couple final questions.

21 A. Okay.

22 Q. The testimony in this case has shown that Mrs. Aaron had  
23 had a shopping cart with her --

24 A. Okay.

25 Q. -- just prior to her fall.

—V. E. Harris - Cross—

1           Did you have an opportunity to measure generally what  
2 the size of those shopping carts are?

3       A. Yes, sir.

4       Q. Okay. How wide is it?

5       A. It's two feet wide and four feet long.

6       Q. Okay.

7           MR. SKAFF: I think that's all I have, Your Honor.

8                               CROSS-EXAMINATION

9       BY MR. WILSON:

10      Q. Mr. Harris, you described yourself as a loss prevention  
11 specialist.

12      A. Yes, sir.

13      Q. And is one of your primary roles to execute initiatives  
14 to reduce losses at the store?

15      A. Yes, sir.

16      Q. And is one of the ways you do that to testify in civil  
17 cases?

18      A. Yes, sir, if I'm called to.

19      Q. And you have no personal knowledge as to what happened  
20 with Mrs. Aaron on June 3rd, do you?

21      A. No, sir.

22      Q. You weren't even working that day, were you?

23      A. No, sir.

24      Q. Other than being the designated witness, did you have any  
25 job responsibilities to perform those safety audits?



—V. E. Harris - Cross—

1 A. I'm sorry?

2 Q. Did you have any job responsibilities to perform those  
3 safety audits?

4 A. Yes, sir.

5 Q. And my understanding is they were about every eight weeks  
6 or so.

7 A. Yes, sir.

8 Q. Are you a licensed engineer?

9 A. No, sir.

10 Q. Do you have any professional licenses?

11 A. No, sir.

12 Q. Do you consider yourself a safety expert?

13 A. No, sir.

14 Q. And you don't know what is within industry tolerances in  
15 terms of safety points, do you?

16 A. Oh, no, sir, I don't.

17 Q. But you've got that Roanoke facility with engineers out  
18 there, right, that use different standards?

19 A. Yes, sir. I just report -- if I see something that's  
20 not -- that I think is not safe, I report it to them.

21 Q. When you take these safety audits do you have a  
22 checklist?

23 A. Yes, sir.

24 Q. And it's something printed off the computer?

25 A. Yes, sir.

—V. E. Harris - Cross—

1 Q. And when you're done with those inspections do you keep  
2 any records of those, or are they sent off to somebody else?

3 A. They're sent off.

4 Q. And, so, the store doesn't keep any records.

5 A. No, sir.

6 Q. One of the things that you were to look at as part of  
7 those safety audits, to my understanding, are the drain  
8 areas, right?

9 A. Yes, sir.

10 Q. And in this case most of the drain areas have those brass  
11 covers on them?

12 A. Yes, sir.

13 Q. And you look to make sure they didn't have loose screws  
14 or that they were level?

15 A. Yes, sir.

16 Q. And you were familiar with the cemented drain area --  
17 we've talked about that -- and that's something you would  
18 check as part of your safety audit, right?

19 A. Yes, sir.

20 Q. And when you were inspecting that particular spot you  
21 never determined, prior to June 3, 2010, that it wasn't  
22 totally flat, did you?

23 A. It's -- every time I checked it, you know, I reported it  
24 to be safe. So I never had any issues where it looked like  
25 it was a hazard and raised up or any kind of hazard for

—V. E. Harris - Cross—

1 anybody.

2 Q. But my question was before June 3rd you believed that the  
3 cement drain plug was totally flat with the floor, did you  
4 not?

5 A. Yes, sir.

6 Q. And you also believed that it was -- or you disagreed  
7 that it was either slightly dished or irregular from the rest  
8 of the floor surface, right?

9 A. Yes, sir.

10 Q. And in your inspections prior to June 3rd, 2010, you had  
11 never actually measured it, had you?

12 A. No, sir.

13 Q. You never checked the slip resistance of the tile  
14 vis-à-vis the cement drain spot, did you?

15 A. No, sir.

16 THE COURT: This is cross-examination. He hasn't  
17 inspected it; you've shown that. Let's move along.

18 BY MR. WILSON:

19 Q. Well, let me ask -- you inspected this thing every eight  
20 weeks?

21 THE COURT: He's inspected it before. Let's move  
22 along, Mr. Wilson.

23 MR. WILSON: Okay.

24 BY MR. WILSON:

25 Q. Now, I understand that now, based on your measurements,

—V. E. Harris - Cross—

1 you now conclude that there is in fact a deviation, after you  
2 measured it after this lawsuit.

3 A. In the little -- in the far corner, the little divot,  
4 pencil head size.

5 Q. Were you surprised to learn that your visual inspection  
6 didn't reveal that deviation?

7 THE COURT: We're talking about a deviation, he  
8 said, of a pencil head?

9 MR. WILSON: That's what he said, and I was  
10 asking --

11 BY MR. WILSON:

12 Q. Did your visual inspection reveal that, and were you  
13 surprised that it did not?

14 A. I'm not sure I understand the question there.

15 Q. All right. When you were looking at it you thought it  
16 was totally flat, right?

17 A. Right.

18 Q. When you measured it you found out it wasn't totally  
19 flat, right?

20 A. Correct.

21 Q. Okay. And, so, were you surprised that when you actually  
22 measured it what you had seen wasn't the way it actually was?

23 A. Yes.

24 Q. Okay. Now, you mentioned something about in the early  
25 2000s there was a -- I think you said a reconstruction or a

—V. E. Harris - Cross—

1 remodel.

2 A. Yes, sir.

3 Q. Okay. And it was my understanding that you had no input  
4 or role in the construction or remodeling process.

5 A. That's correct.

6 Q. And, so, when you talked about a city inspection you  
7 don't know if this area was inspected, do you?

8 A. I know they had to come in -- that I was told that they  
9 come in to do inspections after each section was done, but I  
10 had no control over seeing them come in, walking them through  
11 it, or anything like that.

12 Q. Right. So you don't know if, in fact, anyone ever  
13 inspected that spot.

14 A. That's true.

15 Q. Okay. Now, I'm going to ask you that --

16 THE COURT: Just ask the questions, Mr. Wilson,  
17 please.

18 BY MR. WILSON:

19 Q. As part of this remodel did Kroger put new tile in the  
20 produce area?

21 A. Yes, sir.

22 Q. And was it your understanding that that cement drain plug  
23 had been filled prior to Kroger taking over the store?

24 THE COURT: I don't know what he -- what are we  
25 talking about?

—V. E. Harris - Cross—

1           Did you ever go to the store prior to Kroger taking  
2 over the store?

3           THE WITNESS: Yes, sir. I worked for Hannaford's,  
4 which owned the Kroger store before Kroger bought it.

5           THE COURT: Oh, good. Go ahead.

6 BY MR. WILSON:

7 Q. Did you know that prior to the tile being put down that  
8 the cement drain plug had been filled in by somebody other  
9 than Kroger?

10 A. That I don't know.

11 Q. You do know that Kroger did put down new tile.

12 A. Yes, sir.

13 Q. You gave the dimensions of it. You said it was 12 inches  
14 by 12 inches. How thick was it?

15 A. That I don't know.

16 Q. Okay. You mentioned that some pictures were taken after  
17 the lawsuit, and you said you were present. Who actually  
18 took the pictures?

19 A. We did.

20 Q. Who is "we"?

21 A. I took some and sent them to Mr. Skaff.

22 Q. Okay. I don't want to get into that.

23           But was Mr. Skaff with you when you were taking the  
24 pictures?

25 A. Yes.

—V. E. Harris - Cross—

1 Q. Okay. And did he hold the camera at any time?

2 A. No.

3 Q. And so you took the pictures?

4 A. I took the pictures.

5 Q. With him present?

6 A. Yes, sir.

7 Q. One of the pictures --

8 THE COURT: Do you contend that the pictures aren't  
9 correct?

10 MR. WILSON: What's that?

11 THE COURT: Did you make any contention that the  
12 pictures aren't correct, Mr. --

13 MR. WILSON: No, I'm going to introduce one.

14 THE COURT: Well, why are we doing all of this?

15 MR. WILSON: I'm getting ready to introduce one as  
16 an exhibit.

17 THE COURT: You know, let's get on with it,  
18 Mr. Wilson. Let's get on to the case.

19 MR. WILSON: I would move to introduce this -- it  
20 was originally marked Defendant's 11, but the numbers got  
21 changed, so we can call it P 30.

22 So this would be P 30, although it had originally  
23 been marked D 11, okay?

24 BY MR. WILSON:

25 Q. Looking at that picture, does it look like it's taken

—V. E. Harris - Cross—

1 more from ground level?

2 A. Yes, sir.

3 Q. Okay. And the other pictures that Mr. Skaff had  
4 introduced were taken more from sort of a bird's-eye, up-top  
5 level?

6 A. Yes, sir.

7 Q. And, so, if you look at those -- if you look at the ones  
8 from ground level versus the ones from top level, they look  
9 real different, don't they?

10 A. They look a little different.

11 Q. Okay. Do you know if that area -- when these pictures  
12 were taken had it been cleared out of merchandise that  
13 normally is a seasonal promotion? Had it been moved out so  
14 you could take these pictures?

15 A. Which?

16 Q. Any of the pictures that you took with your lawyer.

17 THE COURT: Do you contend that any of these  
18 pictures are inaccurate? Then I'll be glad to hear it.

19 Let's move along, Mr. Wilson.

20 Do you contend that any of these pictures are  
21 inaccurate? Do you?

22 MR. WILSON: They're inaccurate because they don't  
23 show the display on that day, and that's all I was trying to  
24 establish.

25 MR. SKAFF: We've stipulated --



—V. E. Harris - Cross—

1           THE COURT: They're not intended to show the  
2 display.

3           Let's move along, Mr. Wilson. We want to get to  
4 this trial.

5           MR. WILSON: Okay. That was my last question. I  
6 just wanted to make that point.

7           MR. SKAFF: I have no further questions, Your Honor.

8           THE COURT: What exhibits have we got that may not  
9 be here so I don't have to recall any more witnesses?

10          THE CLERK: P 30 is actually Defendant's Exhibit 11,  
11 but we need to get that in.

12          THE COURT: And that's it?

13          THE CLERK: That's the only one you need to admit.

14          THE COURT: Okay. That's what I was curious about.

15          You're moving for this exhibit to be admitted into  
16 evidence, correct, Mr. Wilson?

17          MR. WILSON: Yes, Your Honor. I renumbered it P 30.

18          THE COURT: All right. It's admitted.

19          MR. WILSON: Thank you.

20          (The exhibit was admitted into evidence.)

21          THE COURT: Anything else?

22          MR. SKAFF: Not of this witness, Your Honor.

23          THE COURT: Anything else of this witness,  
24 Mr. Wilson?

25          MR. WILSON: No, Your Honor.

1 THE COURT: All right. Let's move along.

2 Ladies and gentlemen, just because I'm trying to  
3 move this case doesn't mean I have an opinion one way or the  
4 other. I want to make that abundantly clear. I want to get  
5 this case over.

6 Let's go.

7 MR. SKAFF: That's all I have, Your Honor. I'd like  
8 to take up some issues with Your Honor, but --

9 MR. WILSON: I'd like to call Mrs. Aaron for one  
10 rebuttal question.

11 THE COURT: No, you're not going to call Mrs. Aaron  
12 for any rebuttal question unless it rebuts something that's  
13 said that you did not bring out in your original case.

14 MR. WILSON: It does.

15 THE COURT: Okay?

16 MR. WILSON: Mrs. Aaron, take the witness stand.

17 THE COURT: First let me see. Approach the bench,  
18 Mr. Wilson. We're not starting your case over.

19 MR. WILSON: No, it will only be two questions.

20 (The following was heard at the sidebar out the  
21 hearing of the jury:)

22 MR. WILSON: Did you tell Mr. Heath that you tripped  
23 over your own feet? Did you tell Mr. Heath that --

24 THE COURT: No, I'm not allowing that.

25 MR. SKAFF: She testified yesterday she didn't know

1     what she said.

2             THE COURT: That's exactly right. I'm not allowing  
3     it.

4             MR. WILSON: Okay.

5             (The proceedings resumed in open court as follows:)

6             THE COURT: We're not going to start this case over,  
7     Mr. Wilson, okay?

8             All right. Ladies and gentlemen, we'll be  
9     probably -- I estimate this will take about -- I'd estimate  
10    at least 45 minutes to go over instructions and whatnot with  
11    counsel. I have to go over each one of them with counsel and  
12    then we'll have to discuss it, and we'll do that.

13            Everyone please rise while the jury retires.

14            (The jury withdrew from the courtroom.)

15            THE COURT: All right. Do you have a motion,  
16    Mr. Skaff?

17            MR. SKAFF: Your Honor, just from a housekeeping  
18    standpoint I would make sure that we've moved into evidence  
19    Exhibits D 1 through D 12, which were in our notebook  
20    submitted prior to the incident, minus the document that  
21    we've already talked about.

22            THE CLERK: So it would be D 1 through 3. 4 through  
23    10 is already in.

24            THE COURT: All right.

25            MR. SKAFF: And, Your Honor, 1 through 3, I think,

—V. E. Harris (Proffer) - Direct—

1 was already into evidence, but to make sure --

2 THE COURT: We'll put them in.

3 MR. SKAFF: Thank you.

4 (The exhibits were admitted into evidence.)

5 THE COURT: It was agreed to. Let's go. They're in  
6 evidence.

7 MR. SKAFF: Judge, again, I have the proffer of the  
8 spoliation evidence. I don't know when you want to deal with  
9 that.

10 THE COURT: Deal with it right now, Mr. Skaff.

11 MR. SKAFF: Yes, sir. Would it be all right if I  
12 walk out to get the witnesses? Can they both come in?

13 THE COURT: Yes, they can both come in. This  
14 doesn't have anything to do with the trial.

15 You're reminded you're still under oath, sir. You  
16 can take the witness stand.

17 THE WITNESS: Yes, sir.

18 VERNON E. HARRIS, recalled as a witness for proffer  
19 of the spoliation evidence, having previously been sworn,  
20 testified further as follows:

21 DIRECT EXAMINATION

22 BY MR. SKAFF:

23 Q. Mr. Harris, you've already testified that you're employed  
24 with Kroger in a loss prevention capacity, correct?

25 A. Yes, sir.

—V. E. Harris (Proffer) - Direct—

1 Q. Okay. In that capacity did part of your duties deal with  
2 the surveillance cameras and the video?

3 A. Yes, sir.

4 Q. Describe what your role is in that.

5 A. If we have a shoplifter I need video, internal theft, I  
6 need video and just keep track of the store, watch for safety  
7 conditions and so forth.

8 Q. Okay. And is it part of your role to retrieve video if  
9 there's any incident, theft or accident?

10 A. Yes, sir.

11 Q. Okay. Can you just describe a little bit about the  
12 surveillance camera system at the Shore Drive store?

13 A. Yes, sir. It's -- I have three monitors, two DVRs, and  
14 it's 32 cameras in the whole store.

15 Q. Now, when you walk into a Kroger store there's a lot of  
16 bubbles up on the ceiling.

17 A. Yes, sir.

18 Q. Do all of those bubbles have cameras in them?

19 A. Yes, sir.

20 Q. Okay. Do all of those have active cameras in them?

21 A. Most of the time. Sometimes, you know, they're out, you  
22 know, and we have to get them fixed or replaced.

23 Q. And what is the main purpose as it relates to  
24 surveillance?

25 A. Mainly, it's to deter theft.

—V. E. Harris (Proffer) - Direct—

1 Q. And do you recall dealing with certain theft issues back  
2 in June of 2010?

3 A. Yes, sir.

4 Q. And, as a result, were certain cameras pointed certain  
5 ways?

6 A. Yes, sir.

7 Q. Can you describe that for the Court?

8 A. Yes, sir. We had an issue with DVDs being stolen, and  
9 our DVD section was kind of across the front of the store, so  
10 all of our movable cameras -- to try to catch who was doing  
11 it, we turned all those to face that area.

12 Q. Were you at the store when this incident occurred?

13 A. No, sir, I was not.

14 Q. Okay. How did you get involved?

15 A. I got a call or a text -- I can't remember which one --  
16 from Dale Heath.

17 Q. The store manager?

18 A. Yes, sir.

19 Q. And what were you asked to do?

20 A. I was asked to come in the next day to look at video  
21 because there was an accident in the store.

22 Q. And what did you do in response to that?

23 A. I either called him or texted him back -- I don't  
24 remember which one -- that I would be there the next morning.  
25 And I went there the next morning and talked to him, got the

—V. E. Harris (Proffer) - Direct—

1 exact time or close to the exact time, the area, and I  
2 proceeded to investigate. I walked over there personally  
3 myself to get an idea of what we were talking about, and then  
4 I went back and tried to find it on video.

5 Q. And, so, what was your understanding at that point of  
6 what had happened and where it was?

7 A. My understanding was there was a lady that slipped and  
8 fell over by the produce section.

9 Q. And, so, what did you do? Did you start to look for  
10 video?

11 A. Yes, sir. I went into my office, and I went to that  
12 date, and I went to that time, and I played back video to see  
13 if I had it on video. And the cameras that cover that area  
14 were not pointing in that direction, and one of them was out.

15 Q. Okay. Let's talk about that for a second.

16 Which cameras -- how many cameras did you look at?

17 A. I looked at, I believe, six.

18 Q. So you looked at the video from six --

19 A. Different cameras, yes, sir.

20 Q. The remaining 26 -- did you look at those?

21 A. No, I did not.

22 Q. Why not?

23 A. Because they're in the back of the store, across the  
24 other side of the store, you know, not even in the area.

25 Q. Of the produce section?

—V. E. Harris (Proffer) - Direct—

1 A. Of the produce section.

2 Q. All right. When you looked at those six cameras, the  
3 video from those six cameras, what did you see?

4 A. I saw what they were covering, which was where I turned  
5 them to, but I didn't see any accident.

6 Q. Was there any of those cameras pointed towards the  
7 produce section?

8 A. No.

9 Q. Were there any cameras remotely pointed towards the  
10 produce section?

11 A. There was one that was covering the prep room door.

12 Q. Which is where in relation --

13 A. Which is -- in relation to the picture, it's -- it's this  
14 wall (indicating) farther down.

15 Q. Did you see any video as it relates to the fall involving  
16 Mrs. Aaron?

17 A. No, sir.

18 Q. Did you see any video at all as it related to the area  
19 where the watermelon display was?

20 A. No, sir.

21 Q. And was there any?

22 A. No, sir.

23 Q. Because --

24 A. Because they were -- I had the PTZs, which are our  
25 movable cameras, turned to where I was losing videos to cover



—V. E. Harris (Proffer) - Direct—

1 all of that area.

2 Q. As a result did you -- well, let's talk about the videos.

3 So what happens? The cameras take the video, right?

4 A. The camera records the video.

5 Q. Okay. And, so, what happens?

6 A. It stays into the system for 30 days unless I save it to  
7 the desktop or to a disk.

8 Q. As a result of what you had done -- well, let me back up  
9 again. You went to look for the video?

10 A. Correct.

11 Q. Did anybody else do that with you?

12 A. No, I did that by myself.

13 Q. Okay. As a result of what you didn't see did you keep  
14 anything?

15 A. No, sir.

16 Q. Did you destroy anything?

17 A. No, sir.

18 Q. What happened to the tape?

19 A. After 30 days it records over itself.

20 Q. If the tapes would have been -- let's say we had six --  
21 let's say we had 32 cameras. Had 32 cameras, all the video,  
22 been saved what would we have seen?

23 A. You would have seen customers shopping, you would have  
24 seen employees working, and pretty much that's about it.

25 Q. Okay. Is there any -- you said that -- you said there

—V. E. Harris (Proffer) - Direct—

1 was a camera that wasn't working.

2 A. Right. And that was the foyer cameras, which is inside  
3 the foyer, people coming in and going out.

4 Q. The foyer where?

5 A. In the produce side on the produce -- the produce side of  
6 the store.

7 Q. And that camera was not working?

8 A. That camera wasn't working.

9 Q. Were you ever aware of any type of letter or  
10 correspondence that was sent to the store asking to save  
11 video?

12 A. No, sir.

13 Q. Okay.

14 MR. SKAFF: That's all I have, Your Honor.

15 THE COURT: Nobody told you about a letter being  
16 sent to the store?

17 THE WITNESS: No, sir. I didn't know anything about  
18 the letter until I was shown at deposition.

19 THE COURT: All right. Do you have some questions,  
20 Mr. Wilson?

21 MR. WILSON: I -- I mean, I wasn't planning to  
22 examine him. I thought he was just doing a proffer of what  
23 he thought he would say. I mean, we've briefed it --

24 THE COURT: Do you have any questions, Mr. Wilson?  
25 Just answer my question.

—V. E. Harris (Proffer) - Cross—

1 CROSS-EXAMINATION

2 BY MR. WILSON:

3 Q. Did you know what Mrs. Aaron looked like when you were  
4 looking at the video?

5 A. I got a brief kind of description, but, no, I wouldn't  
6 have, you know --

7 Q. So you wouldn't have known if you saw her or not.

8 A. No.

9 Q. And you've moved the cameras around at different times.  
10 They're not even the same today as they were on the date of  
11 the incident, are they?

12 A. That's correct.

13 Q. And, so, you tried to reconstruct how you thought they  
14 were based on memory, right? On the day of the incident you  
15 tried to reconstruct how you thought the cameras were  
16 positioned based on memory. Is that correct?

17 A. No. What I did is I looked -- I was asked to look for an  
18 accident, and I pulled up video, and the cameras were pointed  
19 in a different area.

20 THE COURT: Did they show any accident on any of the  
21 film.

22 THE WITNESS: No, sir.

23 THE COURT: All right. Let's move along,  
24 Mr. Wilson.

25 MR. WILSON: It's covered in the submissions we've

—D. D. Heath (Proffer) - Direct—

1 already given.

2 MR. SKAFF: Yes, Your Honor, that's all I have of  
3 Mr. Harris.

4 THE COURT: Do you have any --

5 MR. SKAFF: I have Mr. Heath, to ask him about three  
6 or four questions.

7 THE COURT: Who?

8 MR. SKAFF: Mr. Heath, who already testified.

9 THE COURT: Yeah, he's got to testify. I want to  
10 find out about the letter.

11 MR. SKAFF: Yes, sir.

12 THE COURT: Let's go. Do you have a copy of the  
13 letter, Mr. Wilson?

14 MR. WILSON: I may not, Judge. I may not,  
15 because --

16 THE COURT: I just asked if you had a copy. All you  
17 have to do is say, "I don't have one."

18 I think it's attached to your exhibit, so we'll look  
19 in a minute. My clerk will get one. Thank you, Mr. Wilson.

20 DANIEL D. HEATH, recalled as a witness for proffer  
21 of the spoliation evidence, having previously been sworn,  
22 testified further as follows:

23 DIRECT EXAMINATION

24 BY MR. SKAFF:

25 Q. Mr. Heath, you've already testified. You're still under

—D. D. Heath (Proffer) - Direct—

1 oath.

2           You were the store manager at the time of this  
3 accident?

4 A. Yes.

5 Q. Okay. You started to tell the jury a little bit about  
6 this, but let me ask you now.

7           After the fall occurred what did you do as it related  
8 to Mr. Vernon Harris?

9 A. The next day I had him look at video footage to see if --  
10 what he could find.

11 Q. And Mr. Harris is the loss prevention person for the  
12 store?

13 A. Yes.

14 Q. Okay. And is it your understanding that he went to view  
15 those tapes?

16 A. Yes.

17 Q. And what is your understanding of what was on those  
18 tapes?

19 A. Nothing. There was nothing on video.

20 Q. Okay. At some point after the accident you've already  
21 testified about that you received a letter from an attorney  
22 about this incident.

23 A. Yes.

24 Q. Okay. As a result of that letter I would -- I'll -- you  
25 would agree that that letter asked you to save any videotape

1 relating to the incident.

2 A. Yes.

3 Q. Okay. Did you save anything?

4 A. No.

5 Q. Why is that?

6 A. Because there was nothing to save.

7 Q. And that's what had been related to you by Mr. Harris?

8 A. Yes.

9 MR. SKAFF: Okay. That's all I have on that.

10 THE COURT: Do you have any questions?

11 CROSS-EXAMINATION

12 BY MR. WILSON:

13 Q. Did you ever show the letter to Mr. Harris?

14 A. Not -- not that I recall.

15 MR. SKAFF: That's all.

16 THE COURT: I'm going to look at the letter again in  
17 relation to this testimony.

18 MR. SKAFF: Yes, sir. That's all I have, Your  
19 Honor.

20 THE COURT: My clerk is going to see -- it was one  
21 attached to one of the exhibits.

22 MR. SKAFF: I think I have a copy, Your Honor.

23 (There was a pause in the proceedings.)

24 THE COURT: Oh, you have it there.

25 MR. SKAFF: Yes, sir.

1           THE COURT: Thank you. Let me look at it. My  
2 recollection...

3           (There was a pause in the proceedings.)

4           THE COURT: Well, it's scratched out. What was  
5 scratched out?

6           MR. SKAFF: It might have had something to do with  
7 the insurance company, Your Honor. I...

8           (There was a pause in the proceedings.)

9           MR. SKAFF: I'm pretty sure that's what it was.

10          (There was a pause in the proceedings.)

11          THE COURT: The letter does say, "...any  
12 photographs, incident reports or any other documentary  
13 evidence which may be relevant to the incident."

14          How about that, Mr. Wilson?

15          MR. WILSON: Well, that's it. And I don't have the  
16 letter in front of me, so I --

17          THE COURT: All right. We'll...

18          (There was a pause in the proceedings.)

19          MR. WILSON: What I said was, "...place a litigation  
20 hold on all relevant documents and other tangible things  
21 related to the incident, including, without limitation, any  
22 video recordings from store monitoring equipment, copies of  
23 payor information and/or checks..." and whatnot, and the --

24          THE COURT: But you said "...which may be relevant  
25 to the incident".

1           MR. WILSON: Not up top. I said, "...hold all" --  
2           "...on all relevant documents and other tangible" -- "related  
3           to" -- yeah, which may be relevant, right.

4           THE COURT: Right. It had to be relevant for them  
5           to keep it.

6           MR. WILSON: Right.

7           THE COURT: I didn't pay much attention to that,  
8           because I thought -- I'm sorry.

9           MR. WILSON: In your prior decision I think you said  
10          there was relevance because it could show things other than  
11          the fall, because there's a lot of case law that says what  
12          relevance is is much broader than showing just the fall. It  
13          could show some of these witnesses. You already defined what  
14          "relevance" meant in your opinions.

15          And when we say "a litigation hold" -- I mean, I  
16          don't know what more I can do as a lawyer. I said, "...on  
17          all" --

18          THE COURT: When did you get this letter, Mr. Heath?

19          THE WITNESS: The Wednesday following -- actually,  
20          it was delivered to my comanager. I was off that day.

21          THE COURT: Did you ever call Mr. Wilson and say,  
22          "We don't have any such tape"?

23          THE WITNESS: I did not.

24          THE COURT: Did you do anything with Mr. Wilson?

25          THE WITNESS: No.



1           MR. WILSON: And, Your Honor, I don't know if it's  
2 attached to what you have, but a few days later I sent  
3 something to -- and we can say it now -- Sedgewick, the exact  
4 same thing, to the insurer.

5           THE COURT: What is it?

6           MR. WILSON: And I say -- I reiterate the evidence  
7 preservation issues.

8           THE COURT: I think I -- let me see this.

9           (There was a pause in the proceedings.)

10          THE COURT: The part that's missing from the Exhibit  
11 P 9 is the fact it says, "If you've not done so already,  
12 please place your insurance carrier on notice of this  
13 incident."

14          All right. I understand. I don't have any  
15 questions of Mr. Heath.

16          Do you have any more questions?

17          MR. SKAFF: Just one more question, Your Honor.

18                       REDIRECT EXAMINATION

19 BY MR. SKAFF:

20 Q. In response to the letter, Mr. Heath, the photographs  
21 that were taken and the incident reports all were kept.

22 A. Correct.

23          MR. SKAFF: Okay. That's all I have, Your Honor.

24          THE COURT: All right. Let's go into your motion,  
25 Mr. Skaff. You can step down, Mr. Heath. Thank you. You're

1 instructed not to discuss your testimony with any other  
2 witness.

3 All right, Mr. Skaff.

4 MR. SKAFF: Yes, sir. Judge, we would just at this  
5 time -- at the close of the evidence we would just renew our  
6 motion to strike on the same basis.

7 THE COURT: I have some real problems, Mr. Skaff.

8 What is it that's wrong with this thing, Mr. Wilson?  
9 Tell me what you have shown that is wrong with it. Your  
10 expert testified that it was not level -- okay? -- that it  
11 had a concave portion in it. The only concave portion I've  
12 gotten so far is one -- and he didn't say anything protruded  
13 upward, he said that there was an eighth- to a  
14 quarter-of-an-inch dip. He didn't measure the dip, but he  
15 says it was an eighth- to a quarter-of-an-inch dip in it.  
16 What did that do? You say she may have caught her toe in it.  
17 Now, I don't know what it is.

18 MR. WILSON: Well, he described two things. He  
19 described that the texture was different, and he described  
20 that it was uneven, okay? The jury has seen it. They are  
21 the --

22 THE COURT: So it's uneven. But what has that got  
23 to do with anything?

24 MR. WILSON: Well, the testimony from both -- from  
25 Mr. Heath was anything that's uneven he considers a tripping

1 hazard.

2 THE COURT: Yeah, but how does that cause the  
3 accident?

4 MR. WILSON: Because she testified that she came  
5 around, she felt something that was uneven and a different  
6 texture, which caused her foot to jam and to fall. Proximate  
7 cause is a jury question, I would submit.

8 THE COURT: Oh, it is -- well, there's got to be  
9 some evidence of it. The problem is that the only thing  
10 uneven that's been shown so far is this one-quarter or  
11 one-eighth-inch dip.

12 MR. WILSON: The testimony --

13 THE COURT: Is there any other dip been shown?

14 MR. WILSON: His testimony was the whole --

15 THE COURT: It's uneven. I understand.

16 MR. WILSON: The whole surface was uneven, and that  
17 it was as much as a quarter --

18 THE COURT: It is uneven if you've got a  
19 quarter-of-an-inch dip in it.

20 MR. WILSON: Right, but --

21 THE COURT: So he could testify to that. He's just  
22 a paid person, Mr. Wilson.

23 So what is it that caused this fall?

24 MR. WILSON: What it is -- the cement drain plug --  
25 when she turned the corner her foot jammed in it --

1           THE COURT: There's no evidence that her foot jammed  
2 in this drain.

3           MR. WILSON: She said it.

4           THE COURT: There is no evidence that this foot  
5 jammed in this drain or that the drain itself was negligent.  
6 What is the negligence?

7           MR. WILSON: The negligence is it's an unsafe  
8 condition and was --

9           THE COURT: No, it was never any unsafe condition.  
10 It said it was unsafe because it had a pin head one-eighth of  
11 an inch deep?

12          MR. WILSON: Well, one expert said a quarter of an  
13 inch deep, which violated engineering standards, and --

14          THE COURT: There was never any engineering  
15 standards put in evidence. There was nothing scientific  
16 done, period. It was all -- it was uneven, and it is uneven.  
17 I -- I will say there's no evidence saying that it was even,  
18 because there's a quarter- or an eighth-of-an-inch dip in it.

19                I may let it go to the jury, but I have real  
20 misgivings about it. I can't figure out any proximate cause.  
21 I just can't figure it out.

22          MR. WILSON: I have case law that I think says that  
23 we've --

24          THE COURT: I've read all your cases, Mr. Wilson.  
25 You rely on the old *Taylor* case, but that was a question of

1 water on the floor, and the water was coming from a drip of  
2 ice that had come out of the thing and was spilling on the  
3 floor in the *Taylor* case.

4 MR. WILSON: Uh-huh.

5 THE COURT: This is really a very distinguishable  
6 case. I've read the *Taylor* case. I am concerned about it,  
7 because now I'm really trying to figure out what it is that  
8 the jury can figure out.

9 MR. WILSON: Well, I think what they'll figure out  
10 is --

11 THE COURT: And what you're saying is that if a  
12 fellow says that it's uneven you don't have to show anything  
13 else, correct?

14 MR. WILSON: No. What I'm saying is, especially in  
15 a case -- the case law says this:

16 Unsafe condition is a jury question, and when the  
17 jury goes out and looks at it they can --

18 THE COURT: So what -- doesn't there have to be some  
19 testimony that would make it?

20 MR. WILSON: Well, there was testimony that would  
21 make it unsafe. There was an expert who said it. And you  
22 may discount his testimony, but he said it.

23 THE COURT: An expert in -- there isn't any  
24 question.

25 MR. WILSON: And so he has said it, and whether the

1 jury discounts or believes him, that's the jury's  
2 prerogative.

3 THE COURT: We have a guy who's got a Ph.D. from an  
4 institution that was on the Internet that nobody can find.

5 MR. WILSON: He said it went out of business after  
6 about ten years, and I understand that.

7 THE COURT: He's testified to it, and it's been  
8 uncontradicted. It's an Internet institution.

9 MR. WILSON: And he also has a -- he's a  
10 professional licensed engineer.

11 THE COURT: He's an engineer, but it wasn't an  
12 engineer's question. It was not a question of engineering,  
13 it was a question of whether that was safe in relation to  
14 what is normally safe.

15 I'll probably let it go to the jury, but I have  
16 tremendous misgivings, Mr. Wilson, tremendous misgivings.  
17 But I'll let it go to the jury.

18 MR. WILSON: I just think the facts are what they  
19 are, and I think it's a jury question. That's all I can say.  
20 I mean, they can certainly reach a verdict based on what they  
21 have heard, what they have seen, and --

22 THE COURT: They've been out there and looked at it,  
23 so --

24 MR. WILSON: Huh?

25 THE COURT: -- if they find that it's -- they've

1 looked at it, so we'll see.

2 MR. WILSON: Well, that's it. I mean, that's really  
3 my point. Once they've looked at it it took it out of my  
4 hands, because I wasn't there to see what they were looking  
5 at.

6 THE COURT: Well, I certainly wouldn't have let you  
7 go out there. You probably still would have been talking if  
8 you went out there, Mr. Wilson, so --

9 MR. WILSON: I know you're displeased with me, but  
10 I'm trying to keep it quick.

11 THE COURT: -- we'll let it go to the jury.  
12 Have we got the instructions?

13 THE LAW CLERK: No, sir. I --

14 THE COURT: Would you get them for me, please?

15 THE CLERK: Do exhibits, based on the motion in  
16 limine, need to be redacted?

17 THE COURT: You-all can check the exhibits right now  
18 to see if we've got them all.

19 THE CLERK: Didn't the motion in limine say that any  
20 references had to be redacted?

21 MR. SKAFF: I think they were.

22 THE CLERK: So Exhibit 6 is out, but that has to be  
23 redacted.

24 (There was a pause in the proceedings.)

25 THE COURT: So the negligence in this case is the

1 fact that the drain is uneven. Is that correct, Mr. Wilson?

2 MR. WILSON: The negligence is that it was an unsafe  
3 condition posed by the two characteristics of being uneven  
4 and a different texture. The expert even used the words  
5 "grabbed her foot." It was those two, those two in  
6 combination.

7 THE COURT: Nothing was shown that the different  
8 texture would do anything. That's the problem.

9 MR. WILSON: There was testimony on it.

10 THE COURT: There was testimony that it was a  
11 different texture, but it didn't say what the result of any  
12 different texture was.

13 MR. WILSON: He said it grabbed her foot.

14 THE COURT: He said what?

15 MR. WILSON: It grabbed her foot.

16 THE COURT: How could he say it grabbed her foot  
17 when she doesn't even know what caused her to fall?

18 MR. WILSON: She knows what caused her to fall. She  
19 went back afterwards to confirm --

20 THE COURT: Listen.

21 MR. WILSON: The moment she fell she didn't know --

22 THE COURT: You know something, Mr. Wilson? Here  
23 she is -- she's testifying to the name of the person who  
24 helped her, how many times he came up, what he said, how he  
25 talked to her. The only thing she can't remember is what it



1 was that she -- was there. She had a vivid memory of the  
2 person who helped her, got her up off the floor, everything  
3 about him. She had an absolute, total recall. Now she  
4 doesn't have a total recall about making statements. That  
5 might hurt her.

6 MR. WILSON: It may, but it's a jury question.

7 THE COURT: You know, so --

8 MR. WILSON: Your Honor, what she testified to --

9 THE COURT: I'm going to let this case go to the  
10 jury, but I've got terrible misgivings, not to say what  
11 happened.

12 Have we got all the exhibits straight now?

13 THE CLERK: Yes, sir.

14 THE COURT: Just as soon as she brings back the  
15 instructions we'll go over those. It's a very simple case.

16 THE CLERK: We need the demonstrative P 1 and P 2 --

17 THE COURT: They've been marked. Let them go into  
18 evidence.

19 THE CLERK: Are you going to use them in your  
20 closing?

21 MR. WILSON: I may. Let's just see.

22 THE CLERK: All right.

23 THE COURT: They were marked P 1 and P 2.

24 MR. WILSON: P 1.

25 THE CLERK: This one is P 2. That's my handwriting

1       there.   And this one is P 15.

2               MR. WILSON:   And I have P 1.

3               THE CLERK:   Uh-huh.

4               THE COURT:   After this case is tried the big  
5 exhibits will be removed unless they're -- by counsel.

6               MR. WILSON:   Yes, sir.   And I would also make a  
7 motion to substitute the shoes at the appropriate time with a  
8 picture.

9               THE COURT:   Make a motion to do what?

10              THE CLERK:   To substitute a photo for the shoes.

11              THE COURT:   You can have a photograph of the shoes.  
12 It will have to be kept, though, if it's an appeal.

13              MR. WILSON:   We hope there won't be an appeal.

14              THE COURT:   Why don't we take a five-minute break,  
15 and then I'll get the instructions back down, gentlemen.  
16 Everybody can use the facilities.   Because we'll be a little  
17 while on the instructions.

18              (A recess was taken.)

19              THE COURT:   You may be seated.

20              (There was a pause in the proceedings.)

21              THE COURT:   I don't see any reason to have the  
22 technology instruction in here -- we're going to try to make  
23 this as simple as possible -- unless you-all insist on it.

24              Let's go down them, okay?   Are you ready?

25              The first instruction is a canned instruction.

1           The second instruction is canned.

2           All right. Let's go to preponderance of the  
3 evidence.

4           (There was a pause in the proceedings.)

5           THE COURT: So we go to the preponderance of the  
6 evidence. Any problems?

7           Okay. Next is the negligence issue and allocation  
8 of burdens of proof.

9           "The issue in this case is was Kroger negligent. If  
10 Kroger was negligent, was its negligence a proximate cause of  
11 the accident? On this issue the plaintiff has the burden of  
12 proof.

13           "3. Was the plaintiff negligent? If so, was her  
14 negligence a proximate cause of the accident? On these  
15 issues the defendant has the burden of proof.

16           "And, lastly, if the plaintiff is entitled to  
17 recover, what is the amount of her damages? On this issue  
18 the plaintiff has the burden of proof."

19           Any problems? Hearing none...

20           "Both the plaintiff and the defendant have a  
21 duty" -- uh-oh. "...have a duty to exercise reasonable  
22 care." The E is off. I'm just going to print it. I'm not  
23 going to -- "...have a duty to exercise reasonable care in  
24 performing the duties defined in these instructions."

25           "Reasonable care is that care that a reasonable

1 person would exercise under the same or similar  
2 circumstances."

3 "Verdict: You shall find your verdict for the  
4 plaintiff if she has proved by the greater weight of the  
5 evidence that, one, the defendant was negligent and that the  
6 defendant's negligence was a proximate cause of the  
7 plaintiff's accident and damages. You shall find your  
8 verdict for the defendant if the plaintiff failed to prove  
9 either or both of those two elements above or if you find by  
10 the greater weight of the evidence that the plaintiff was  
11 contributorily negligent and that her contributory negligence  
12 was a proximate cause of the accident.

13 "The defendant's duty to an invitee in general: An  
14 occupant of premises such as the Kroger Company does not  
15 guarantee an invitee's safety; rather, it has the duty, one,  
16 to use ordinary care to have the premises in a reasonably  
17 safe condition for an invitee's use, consistent with the  
18 invitation, unless the invitee knows or should have known of  
19 an unsafe condition, and to use ordinary care to warn an  
20 invitee of any unsafe condition about which the occupant  
21 knows or by the use of ordinary care should know, unless the  
22 unsafe condition is open and obvious to a person using  
23 ordinary care for her own safety. If an occupant fails to  
24 perform either or both of these duties then it is negligent."

25 "Definition of proximate cause: The word

1 'proximate' as used in these instructions in defining  
2 'proximate cause' is a legal term. It does not mean  
3 approximate. It is a cause of an accident, injury or  
4 damage" -- "is a cause" has been repeated here; I don't know  
5 why -- "which in the natural and continuous sequence" -- take  
6 out the other "cause," a typographical matter -- "which in  
7 natural and continuous sequence produces the accident, injury  
8 or damage. It is a cause without which the accident, injury  
9 or damage would not have occurred. There may be more than  
10 one proximate cause of an injury or damage. The fact that  
11 there was an accident and the plaintiff was injured does not  
12 of itself entitle the plaintiff to recover."

13 "Contributory negligence is the failure to act as a  
14 reasonable person would have acted for her own safety under  
15 the circumstances of the case. When the defendant Kroger  
16 Company claims contributory negligence as a defense the  
17 Kroger Company has the burden of proving by a preponderance  
18 of the evidence that the plaintiff was negligent and that  
19 this negligence was a proximate cause of the plaintiff's  
20 injuries."

21 "If you find from the greater weight of the evidence  
22 that both the plaintiff and defendant were negligent and that  
23 their negligence proximately contributed to the accident, you  
24 may not compare the negligence of the parties. Any  
25 negligence of the plaintiff which was the proximate cause of

1 an accident will bar the plaintiff from recovery."

2 "If you are permitted" -- "You are permitted" -- I'm  
3 putting the spoliation instruction in next.

4 "You are permitted but not required to infer that  
5 the store's June 3rd, 2010, surveillance videotapes would  
6 have been unfavorable to Kroger's theory of the case based on  
7 Kroger's intentional destruction of the videotapes after the  
8 store manager had received an evidence preservation letter."

9 (There was a pause in the proceedings.)

10 THE COURT: "If you do draw an adverse inference  
11 against Kroger from its conduct, then you may consider that  
12 inference with the other evidence to decide the question of  
13 negligence."

14 Personal injury damages are next.

15 "If you find your verdict for the plaintiff, then in  
16 determining the damages to which she is entitled you shall  
17 consider any of the following which you believe by a  
18 preponderance of the evidence was caused by the negligence of  
19 the defendant, the Kroger Company, by and through its  
20 employees." And this is just a canned instruction.

21 Any problems with any of them so far?

22 MR. SKAFF: Yes, sir.

23 MR. WILSON: Go ahead.

24 THE COURT: All right.

25 MR. SKAFF: I had --

1           THE COURT: And then there's "Deliberation," which  
2 is another canned instruction.

3           All right. Which one do you have a problem with,  
4 Mr. Skaff, other than the spoliation instruction, which I  
5 know that you object to strongly?

6           MR. SKAFF: Yes, sir.

7           THE COURT: Your objection is noted. What else?

8           MR. SKAFF: The -- on the proximate cause  
9 instruction, Your Honor, in the last -- the last -- second  
10 paragraph, the statement, "The fact that there was an  
11 accident and the plaintiff was injured does not in and of  
12 itself entitle the plaintiff to recover" -- I'm just asking  
13 the question about whether or not that should just be a  
14 separate instruction or whether that was intended to be  
15 there. I know from the Virginia Model Instructions that that  
16 is a separate instruction.

17           THE COURT: It is generally a separate instruction.  
18 Do you want it separate?

19           MR. SKAFF: I think I would, Your Honor.

20           And, again, from --

21           THE COURT: Okay.

22           MR. SKAFF: In terms of the spoliation instruction,  
23 we would object that it be given generally, but in terms of  
24 this particular instruction I think the evidence is clear  
25 that there was not intentional destruction of these

1 videotapes, and I think that's even harsh on the spoliation  
2 issue.

3 THE COURT: I'll take out the word "intentional" and  
4 just say "destruction."

5 MR. WILSON: Your Honor, I thought that your order  
6 twice said that it was intentional in the sense that it was  
7 allowed to happen willfully. And that is actually --  
8 because, I mean, if it's -- I can read it, and it was  
9 correct. And I'm not just pandering. I mean, it was a  
10 correct statement of the law because it has to be. I mean,  
11 that's really sort of --

12 THE COURT: I'm taking out "intentional."

13 MR. WILSON: Okay. All right. I do have --

14 THE COURT: The question is that -- there's no  
15 question that they intended to destroy the tapes, and there's  
16 no question that it was after they had gotten a letter, but  
17 it wasn't because it was unfavorable. They destroy the tapes  
18 every 30 days. Unfortunately, after the testimony I can't  
19 find that, but I'm going to do the other.

20 Okay, Mr. -- okay. We'll retype these two, then.  
21 Okay.

22 MR. WILSON: I have one that I might suggest to add.

23 THE COURT: All right. What else do you have,  
24 Mr. Wilson?

25 MR. WILSON: This is a Model Jury Instruction that



1 particularly applies to premises cases, and it is the one  
2 that talks about -- number one, we don't have a definition of  
3 "invitee." It's been stipulated, but I just want to make  
4 sure that that's not going to get lost in the shuffle.

5 There's typically a definition that I put in my version --

6 THE COURT: Well, just what do you want?

7 MR. WILSON: A definition of what "invitee" is or  
8 that we've stipulated to it.

9 THE COURT: Just wait. Just stop.

10 MR. WILSON: I put in an instruction --

11 THE COURT: What do you want? Just give me the  
12 instruction you want. Don't give me a whole lot of, you  
13 know, who-struck-John.

14 MR. WILSON: My Number P 21.

15 THE COURT: Okay. Let's see it.

16 MR. WILSON: P 21, and that is the Model Jury  
17 Instruction.

18 THE COURT: How many instructions do you want to  
19 give, now?

20 All right. What is this? Definition...

21 (There was a pause in the proceedings.)

22 THE COURT: Oh, goodness. I'm just saying, "An  
23 invitee is one who visits the premises lawfully at the  
24 express or implied invitation of the occupant."

25 MR. WILSON: We've stipulated to it.

1 THE COURT: I don't mind that, okay?

2 MR. WILSON: Okay. Thank you.

3 THE COURT: But I'm not going to give all this -- an  
4 express invitation? Nobody is going to word it like that.

5 MR. WILSON: Don't need it.

6 THE COURT: "An invitee is one who visits the  
7 premises lawfully at the express or implied invitation of the  
8 occupant. He or she is one who visits."

9 I'm sure you want to say "she," don't you?

10 MR. WILSON: I have no problem with that.

11 THE COURT: Oh. If you have no problem with it,  
12 I'll eliminate it.

13 MR. WILSON: No --

14 THE COURT: You don't want it? Do you want it or  
15 not?

16 MR. WILSON: Yes.

17 THE COURT: Don't give me that who-struck-John,  
18 Mr. Wilson.

19 MR. WILSON: Yes, I do. Thank you.

20 THE COURT: Okay. That's it. Okay. "He or she."  
21 The rest of it is just surplusage.

22 And I'm not going to give you the second  
23 instruction.

24 MR. WILSON: Just so the record is clear, the second  
25 instruction that I've proffered that's been rejected is the

1 one that discusses the Model Virginia Jury Instruction that  
2 says --

3 THE COURT: Maybe I'd better give it. I'll give it.  
4 "An invitee has a right to assume the premises were  
5 reasonably safe."

6 MR. WILSON: "Until she knows otherwise."

7 THE COURT: I'll add that to the invitee. Wait a  
8 minute.

9 (There was a pause in the proceedings.)

10 THE COURT: I'll take out, "He or she is one who  
11 visits other than for a social purpose," because she had gone  
12 there for her own convenience. She said she went there to  
13 shop. That could cause confusion.

14 MR. WILSON: I think that's a very wise --

15 THE COURT: Yes, I think -- Mr. Wilson, it doesn't  
16 hurt you. It certainly helps you. "An invitee..."

17 (There was a pause in the proceedings.)

18 THE COURT: How is this? Let me ask Mr. Skaff.

19 "An invitee is one who visits premises lawfully at  
20 the express or implied invitation of the occupant. He or she  
21 is one who visits other than for a social purpose. An  
22 invitee has a right to assume that the premises are  
23 reasonably safe to utilize."

24 Any problem with that, Mr. Skaff?

25 MR. SKAFF: I think that that's probably a proper

1 statement of the law. I would just object to the second  
2 portion of that just because that's not included in the Model  
3 Jury Instruction that I have, but --

4 THE COURT: What is the second portion?

5 MR. SKAFF: It doesn't have that. It just says, "An  
6 invitee is one" -- it just has that first paragraph that you  
7 mentioned.

8 THE COURT: "An invitee has a right to assume the  
9 premises are reasonably safe to utilize."

10 MR. SKAFF: I think that's a proper statement of the  
11 law, Your Honor.

12 THE COURT: All right. Okay.

13 MR. SKAFF: And, Judge, I had a few additional that  
14 I would offer, if that's appropriate at this time.

15 THE COURT: What?

16 MR. SKAFF: I have a few additional that I would  
17 offer --

18 THE COURT: All right. Tell me what you want to  
19 offer.

20 MR. SKAFF: Yes, sir. In the ones that we submitted  
21 to the Court, Instruction D 9, "You must not base your  
22 verdict in any way upon sympathy, bias, guesswork or  
23 speculation. Your verdict must be solely on the evidence and  
24 instructions of the Court."

25 THE COURT: "In deciding the facts of this case you

1 must not be swayed by sympathy for any party, nor bias or  
2 prejudice or favors to any party. Our system of law does not  
3 permit jurors to be governed by prejudice, sympathy, bias,  
4 guesswork or speculation and, therefore, only by proof."  
5 I'll just add that.

6 MR. SKAFF: Yes, sir.

7 (There was a pause in the proceedings.)

8 THE COURT: Okay.

9 MR. SKAFF: I would offer Instruction D 8, which is  
10 again a Model Jury Instruction, which says, "The amount sued  
11 for or sought is not evidence in this case. You should not  
12 consider it" --

13 THE COURT: I don't allow anybody to mention the  
14 amount sued for in federal court.

15 MR. WILSON: I think that's a state court rule. I  
16 tried to do it and got --

17 THE COURT: That's a state court thing. We don't  
18 allow people to discuss it. The ruling is clear that what an  
19 attorney may think is the value of the case doesn't  
20 necessarily mean anything.

21 MR. SKAFF: Judge, the remaining ones that I would  
22 tender to the Court basically deal with, obviously, it's our  
23 theory of the case that this was an open and obvious  
24 condition and, therefore, the plaintiff was contributorily  
25 negligent in not seeing it.

1           The Court is going --

2           THE COURT: I'm not even sure that it was an unsafe  
3 condition, Mr. Skaff.

4           MR. SKAFF: I understand.

5           THE COURT: And how would the plaintiff have known  
6 that? You know, I'm just not going to give it.

7           MR. SKAFF: Your Honor, just for the record, we  
8 would offer Exhibits -- Instructions D 25 --

9           THE COURT: What is D 25?

10          MR. SKAFF: All of these are -- I mean, I can go  
11 through each of these, if you like, Judge, but all of these  
12 deal with --

13          THE COURT: Go through whatever you want to --

14          MR. SKAFF: Okay.

15          THE COURT: -- because otherwise -- and what I'll  
16 do -- when the instructions are given I'll give you an  
17 opportunity to object. What I suggest you do, because the  
18 Federal Rules are different than the state rules, is just say  
19 you adopt the objections you made when the instructions were  
20 discussed with the Court. That way you're fully protected, I  
21 think, okay?

22          MR. SKAFF: And, along those lines, just let me go  
23 ahead and state this for the Court --

24          THE COURT: All right.

25          MR. SKAFF: -- that we would just note our objection

1 to the jury being instructed in any way, because we think  
2 this is a case that should have been dismissed before the  
3 instruction phase.

4 THE COURT: You say there's not sufficient evidence  
5 to go to the jury.

6 MR. SKAFF: Yes, sir.

7 THE COURT: I understand that, Mr. Skaff.

8 MR. SKAFF: Okay. Judge, we would offer Instruction  
9 D 25, which says, "The defendant has no duty to warn of  
10 conditions that are open and obvious to a person using  
11 ordinary care for her own safety."

12 D 26: "The plaintiff was contributorily negligent  
13 if she had" --

14 THE COURT: Wait a minute. Let me see what we've  
15 got on that.

16 MR. SKAFF: I don't think there's any -- I don't  
17 think there were any instructions related to anything open  
18 and obvious.

19 THE COURT: Let me see.

20 (There was a pause in the proceedings.)

21 THE COURT: All right. You're probably right about  
22 that, Mr. Skaff, okay?

23 MR. SKAFF: Yes, sir.

24 We would offer --

25 THE COURT: Wait a minute.

1 MR. SKAFF: I'm sorry.

2 (There was a pause in the proceedings.)

3 THE COURT: Okay.

4 MR. SKAFF: We would offer Instruction D 28, which  
5 says, "The plaintiff" --

6 THE COURT: Stop a minute.

7 The instruction you want to offer -- I don't have  
8 your proffered instructions in front of me right now.

9 THE LAW CLERK: They should be there.

10 THE COURT: Are they up here?

11 THE LAW CLERK: They should be in here.

12 (There was a pause in the proceedings.)

13 THE COURT: All right. So the instruction you want  
14 is number what, now?

15 MR. SKAFF: D 25 is the one that we just discussed,  
16 Your Honor.

17 THE COURT: Okay. I'll allow that. I don't see any  
18 problem with it; it's canned.

19 MR. WILSON: And I'll just note an objection.

20 THE COURT: Why?

21 MR. WILSON: Because I think the definition of "open  
22 and obvious," as stated by the Fourth Circuit, is in a case  
23 called *Freeman v. Case Corporation*.

24 MR. SKAFF: Well, at this time I don't think there's  
25 been any -- there was -- the instruction as it relates to



1 what is open and obvious was not tendered. Maybe we could  
2 discuss that, but --

3 MR. WILSON: I guess we need to figure out, but --

4 THE COURT: You've got me confused, now. Stop.

5 Mr. Skaff, are you asking me to add D 25?

6 MR. SKAFF: Yes, sir.

7 THE COURT: All right. And you're objecting to  
8 D 25. Is that correct, Mr. Wilson?

9 MR. WILSON: Without any instruction further. I'm  
10 objecting to it standing alone.

11 THE COURT: Stop a minute. Let me ask you a  
12 question.

13 Why didn't you object to it when it was originally  
14 offered and sent in?

15 MR. WILSON: Because I didn't know -- when we  
16 originally offered and sent them in? Because I didn't know  
17 that we were --

18 THE COURT: Well, they were supposed to be sent in  
19 five days before the trial. You never objected.

20 MR. WILSON: I didn't -- I didn't see anything in  
21 the rules that said we had to object to anything.

22 THE COURT: But I'll allow you to object --

23 MR. WILSON: Thank you.

24 THE COURT: -- Mr. Wilson. I'll allow it. I --

25 MR. WILSON: I don't -- the only thing is my

1 definition -- it will work in tandem with this.

2 THE COURT: I'm not about to -- I'm going to give  
3 the instruction.

4 What else have you got, Mr. Skaff?

5 MR. SKAFF: Well, to jump to this point, Your Honor,  
6 we would offer D 32, which --

7 THE COURT: Stop. D 25?

8 MR. SKAFF: Yes, sir.

9 THE COURT: Now you're offering, again, D --

10 MR. SKAFF: 32.

11 THE COURT: There's nothing on that in here. 32?  
12 What is D 32?

13 MR. SKAFF: It says, "An open and obvious condition  
14 is one that could have been seen by the plaintiff, had she  
15 been looking."

16 THE COURT: I'm not going to give it.

17 MR. SKAFF: Yes, sir.

18 THE COURT: I think "open and obvious" -- they'll  
19 know what "open and obvious" is, okay?

20 MR. SKAFF: We would just note our objection to  
21 that.

22 THE COURT: Unless Mr. Wilson wants it.

23 MR. WILSON: I do not. I'm objecting to all of his  
24 on "open and obvious" until I get my chance to give you my  
25 portion.

1 THE COURT: I didn't hear you, Mr. Wilson.

2 MR. WILSON: I'm sorry, sir. I'm objecting to all  
3 of his "open and obvious" instructions, and I don't object to  
4 25 conditioned on me giving my one that we haven't talked  
5 about yet.

6 THE COURT: Okay. Anything else?

7 MR. SKAFF: Yes, sir, I have a few others.

8 Instruction D 28: "The plaintiff is charged with  
9 seeing what she could have seen had she looked where she was  
10 going."

11 THE COURT: What do you say about that, Mr. Wilson?

12 MR. WILSON: These aren't Model Jury Instructions,  
13 he's citing cases. He's writing his brief.

14 THE COURT: I know -- do you object?

15 MR. WILSON: I object, yes.

16 THE COURT: All right. Say that. Objection  
17 sustained.

18 What is next?

19 MR. SKAFF: Instruction D 29, Your Honor: "If you  
20 find that the condition was an open and obvious condition and  
21 thus should have been avoided by the plaintiff exercising  
22 reasonable care for her own safety, then the plaintiff is  
23 guilty of contributory negligence."

24 THE COURT: What's your position?

25 MR. WILSON: Same objection to his --

1           THE COURT: I don't -- there isn't any same  
2 objections, Mr. Wilson. Tell me, what is your objection to  
3 this instruction?

4           MR. WILSON: It is duplicative of D 25, and it is  
5 citing from case law to basically make an argument, as  
6 opposed to a statement of law. It's duplicative of D 25.

7           THE COURT: D 25. It does look like...

8           (There was a pause in the proceedings.)

9           THE COURT: Well, you can have either D 25 or D 29.  
10 Which one do you want, Mr. Skaff?

11          MR. SKAFF: Well, Judge, I think they're different.  
12 D --

13          THE COURT: I'm sure they are. You can have one or  
14 the other.

15          MR. SKAFF: I would like D 29, Your Honor.

16          THE COURT: Okay. D 25 is out.

17          Okay. What else is it?

18          MR. SKAFF: Judge, I have a couple more.

19          D 31: "When a condition is so slight or ordinary  
20 that no careful or prudent person would reasonably anticipate  
21 any danger from its existence, then as a matter of law there  
22 is no actionable negligence."

23          That is a -- it is not a Model Jury Instruction,  
24 Your Honor, but it is an accurate statement of Virginia law,  
25 coming from a Supreme Court case.

1           THE COURT: You're saying that's from the *Hill v.*  
2 *City of Richmond*. Isn't that correct?

3           MR. SKAFF: Yes, sir.

4           THE COURT: All right. What have you got to say  
5 about that, Mr. Wilson? That's a pretty important  
6 instruction that he's asking for.

7           MR. WILSON: I think, number one, it's a sidewalk  
8 case that he's citing to. *Hill v. City of Richmond* is a  
9 sidewalk case, and we've already gone down that path.

10           The way the Model Jury Instruction is set up, it  
11 simply says they must provide a reasonably safe shopping  
12 environment. And you've already given that instruction, and  
13 it's up to the jury to determine what is reasonably safe.  
14 That's the Model Jury Instruction. He's asking for a  
15 directed verdict with that.

16           (There was a pause in the proceedings.)

17           THE COURT: Okay. Here's what I'm going to give:

18           "If you find by a preponderance of the evidence that  
19 the condition is so slight or ordinary that no careful or  
20 prudent person would reasonably anticipate any danger from  
21 its existence, then as a matter of law there's no actionable  
22 negligence." Okay?

23           What's next?

24           MR. SKAFF: Yes, sir.

25           THE COURT: Got any more, Mr. Skaff?

1           MR. SKAFF: No, sir. I think that's all we have.

2           THE COURT: Okay. I understand you object to any  
3 and all instructions.

4           All right. What about you, Mr. Wilson? What do you  
5 have?

6           MR. WILSON: I'm objecting to all of the ones you  
7 just admitted. I only have two more.

8           THE COURT: No, you always have to state what your  
9 objections are. He's objecting to all the instructions on  
10 the ground you haven't proved your case. You're saying  
11 you've proved your case as a matter of law, correct?

12          MR. WILSON: What I'm saying is the instruction that  
13 you just read -- I didn't make note of the number -- where  
14 you say that if it's so slight -- I'm objecting to that  
15 because it is --

16          THE COURT: I haven't said it was so slight. I  
17 said, "If you find by a preponderance of the evidence that  
18 the condition is so slight or ordinary that no careful or  
19 prudent person would reasonably anticipate any danger from  
20 its existence, then as a matter of law there's no actionable  
21 negligence."

22          MR. WILSON: Well, I object to it because I think  
23 the duty to an invitee, which is a Model Jury Instruction,  
24 addresses that where it says, "...to use ordinary care to  
25 have the premises in a reasonably safe condition for an

1 invitee's use, consistent with the invitation."

2 THE COURT: So what you're saying is you don't  
3 dispute this is the law.

4 MR. WILSON: I do dispute that's the law.

5 THE COURT: You do?

6 MR. WILSON: Yeah. I don't think --

7 THE COURT: So you don't like the case of *Hill v.*  
8 *City of Richmond*.

9 MR. WILSON: Absolutely not. *Hill v. City of*  
10 *Richmond* has been rejected in a premises liability context --

11 THE COURT: Okay.

12 MR. WILSON: -- because it's --

13 THE COURT: Anything else?

14 MR. WILSON: Yeah, I have two additional.

15 We need one on circumstantial evidence, the standard  
16 circumstantial evidence. I didn't see it in there. I read  
17 through, and I don't remember seeing circumstantial evidence,  
18 just the standard instruction.

19 THE COURT: All right. Circumstantial evidence  
20 instruction -- which one do you want to give?

21 MR. WILSON: It's my P 5. It's a Model Virginia  
22 Jury Instruction.

23 THE COURT: Let me look at it. P 5.

24 You don't have to give it to me. I think I've got  
25 your instructions here. Wait a minute.

1 (There was a pause in the proceedings.)

2 THE COURT: Okay. P 5. All right. Don't give it  
3 to me.

4 MR. WILSON: And, lastly --

5 THE COURT: Let me discuss P 5, will you?

6 (There was a pause in the proceedings.)

7 THE COURT: Do you have any problem with P 5,  
8 Mr. Skaff?

9 MR. SKAFF: No, sir. I think that's an accurate  
10 statement.

11 THE COURT: Okay, P 5.

12 What else do you want?

13 MR. WILSON: P 24.

14 THE COURT: Who?

15 MR. WILSON: P 24.

16 THE COURT: 24.

17 (There was a pause in the proceedings.)

18 THE COURT: No, I won't give P 24. It assumes that  
19 the hazard presented by the defect was -- it was a hazard. I  
20 can't do it.

21 Okay. What else have you got?

22 MR. WILSON: That's -- maybe I need to reword it,  
23 but under the --

24 THE COURT: You don't have to reword anything. I'm  
25 objecting to it. We've got to end this case some day,



1 Mr. Wilson.

2 MR. WILSON: Okay. Well, I -- I note my objection  
3 to --

4 THE COURT: You note your objection to my denial.  
5 My denial of it is it assumes there's a hazard. I'm not  
6 going to do that.

7 What's next? We can't start all over. I'm not  
8 going to do it.

9 MR. WILSON: I'm done.

10 THE COURT: You're done? All right.

11 Anything else, Mr. Skaff?

12 MR. SKAFF: No, sir.

13 THE COURT: Let me see if I can't embody these, and  
14 then we'll be back, okay?

15 MR. SKAFF: Yes, sir.

16 (A recess was taken.)

17 THE COURT: Somehow or another we left out some  
18 instructions.

19 You may be seated.

20 We left out some instructions. We left out  
21 credibility of the witnesses before, and I've reinstated  
22 that.

23 We left out -- well, I discussed them with you  
24 before. We left out expert witness. "In considering the  
25 weight to be given to the testimony of an expert witness, you

1 should consider the basis for his opinion and the manner by  
2 which he arrived at it and the underlying facts and data upon  
3 which he relied. An expert witness is to be judged by the  
4 same standard as any other witness."

5 Then we've got circumstantial evidence in there,  
6 preponderance of the evidence. Then we come to negligence  
7 issues, the definition of an invitee, the duty to exercise  
8 rights of an invitee, the defendant's duty to an invitee in  
9 general. That also says if you -- the part here, "If it's so  
10 slight or ordinary that no careful or prudent person would  
11 reasonably anticipate any danger, then as a matter of law  
12 there's no actionable negligence."

13 "'Proximate cause' is a legal term that does not  
14 mean 'approximate' with an A in front. It is the cause of an  
15 accident, injury or damage and one which, in the natural and  
16 continuous sequence, produces the accident, injury or damage.  
17 It is a cause without which the accident, injury or damage  
18 would not have occurred."

19 "Contributory negligence" -- what is the alleged  
20 contributory negligence in this case? Why am I giving this  
21 instruction? I know there's no objection to it, but...

22 MR. SKAFF: Yes, sir. I mean, obviously, it would  
23 be our contention this is an open and obvious condition and  
24 that if she fails to see an open and obvious condition and  
25 trips over it then she's contributorily negligent.

1           THE COURT: Isn't that sort of the antithesis of  
2 what you say?

3           Now, don't you come up with any objection at this  
4 stage, Wilson. I will hit you over the head if you do.

5           MR. WILSON: I know you would, so I'm not going up  
6 to the podium so I don't get too close. I was standing for  
7 my back.

8           THE COURT: Oh, okay. I'm just going to tell you  
9 I'm not going to start all over.

10          I have misgivings about it, though. What you're  
11 saying is it's so obvious -- it doesn't seem to be  
12 consistent. It doesn't seem to me to be consistent.

13          Okay. Other than that, I don't think there's  
14 anything there. We'll -- my guess is that the -- let's get  
15 the jury back in, then, in that case, and we'll go ahead from  
16 there.

17          Anything else you want to take up while the jury is  
18 out?

19          MR. WILSON: Just in terms of your procedure, are  
20 you going to give us the numbers to write on them as we go  
21 through?

22          THE COURT: I don't care if you write any number you  
23 want. I don't write numbers on my instructions.

24          MR. WILSON: Okay. All right. It says, "Jury  
25 Instruction No." -- I've got it.

1           THE COURT: I try to keep -- I don't want them to  
2 know how many instructions there are, and sometimes you  
3 change the numbers and you pull things and you put things --  
4 yes, sir.

5           MR. SKAFF: Judge, just for the record, we would  
6 just renew our objections that we stated earlier during the  
7 course of discussing the objections with regard to  
8 the instructions that were rejected.

9           But in particular we would again renew the objection  
10 to the spoliation instruction, and we would again renew our  
11 objection to the jury being instructed in any way, because we  
12 don't think the plaintiff has proven the case.

13          THE COURT: Well, the problem with the spoliation  
14 instruction is the only way we could determine that the tapes  
15 were there were -- was the person who looked at them. Once  
16 he was on notice that they were there, the cases seem to hold  
17 that unless there's somebody else that could look to see what  
18 that evidence was or was not we've got a problem. And that's  
19 where we really are, Mr. Skaff.

20          MR. SKAFF: Yes, sir.

21          THE COURT: And I think I iterated that before in my  
22 opinion. However, I did not have the testimony of the -- at  
23 the time I did that I didn't have the testimony of the safety  
24 man, who indicated that all the cameras were pointed to where  
25 there were more expensive products because they were designed

1 for thievery, not for safety. They were designed to capture  
2 thieves.

3 So if there's nothing else, would you tell  
4 Mr. Pierce to bring in the jury, please.

5 How long do you want, Mr. Wilson?

6 MR. WILSON: I don't -- I will do my very, very best  
7 to be somewhere between 20 and 25 minutes, and then rebuttal.

8 THE COURT: All right. You have 25 minutes. If you  
9 won't do your best you won't exceed it, okay? You have  
10 25 minutes.

11 Is that sufficient for you, Mr. Skaff?

12 MR. SKAFF: Yes, sir. I won't be very long.

13 THE COURT: All right. That's opening and rebuttal,  
14 Mr. Wilson.

15 MR. WILSON: Okay.

16 THE COURT: 25 minutes.

17 (The jury entered the courtroom.)

18 THE COURT: Ladies and gentlemen, I'm sorry we took  
19 so long, but framing the instructions is an opportunity for  
20 everybody to make their objections they desire to make and to  
21 formulate what they believe are appropriate instructions.

22 At this time we will first hear from Mr. Wilson, who  
23 will argue his position. And then we'll hear from Mr. Skaff,  
24 and he'll argue his position. And then Mr. Wilson can come  
25 back. However, they won't argue more than 25 minutes each.

1     So I'll tell you that.

2             We may have to take a break. I do know that you've  
3     been ordered lunch, and it will get in here sometime, I hope,  
4     soon. It takes approximately an hour from the time it's  
5     ordered to get it here.

6             All right, Mr. Wilson, we'll hear from you first.

7             MR. WILSON: Thank you, Your Honor.

8             Let me first thank each of you for the time and  
9     attention that you've paid to this case. On behalf of Mrs.  
10    Aaron, that is very important, and we appreciate it.

11            As the Judge said, in a short while you're going to  
12    begin your deliberations. And the Judge will explain to you  
13    in the instructions that what your task is is to apply the  
14    law as he's going to instruct you and to resolve any factual  
15    disputes in the case based on the evidence that you have  
16    heard.

17            And, certainly, the role of the jury in that process  
18    is a cornerstone of the judicial system. And, as the Judge  
19    has said, for over 300 years juries have been sitting such as  
20    yourselves; good people who come in and set standards for  
21    safety and for other types of protections that affect all of  
22    us.

23            Now, in the oath that you took as jurors you  
24    promised to follow the law as charged. The Judge will  
25    instruct you on certain aspects of the law. One of the

1 instructions that he will give you will relate to the duty  
2 that a store owes to what's called an invitee. And if you  
3 remember when we read one of the stipulations, an invitee is  
4 somebody who comes on the premises because they're there to  
5 shop or whatever because the business is extending that  
6 invitation.

7 Now, the issues in the case are whether -- and these  
8 are based on the instructions from the Court. Your verdict  
9 will be based on the facts as you find them and on the law  
10 contained in all of these instructions. The issues in the  
11 case are, one, was Kroger negligent, and, two, if Kroger was  
12 negligent was its negligence a proximate cause of Ms.  
13 Aaron's injuries. On those issues Mrs. Aaron has the burden  
14 of proof, and I'll explain that in a moment.

15 If the plaintiff is entitled to recover, the next  
16 question is what is the amount of the damages to which she's  
17 entitled based on the evidence that you've heard and based on  
18 the instructions that the Judge is going to give you. On  
19 this issue the plaintiff again has the burden of proof.

20 Now, when you get the instructions you're going to  
21 see what the burden of proof is in a case such as this. The  
22 burden of proof is described as the preponderance of the  
23 evidence. And a preponderance-of-the-evidence  
24 standard basically, if you're looking at the scales of  
25 justice, is 51 percent versus 49 percent. It is not the

1 higher burden you hear in some of the criminal cases, and  
2 that will be included in what the Judge will instruct you  
3 when we get to that point.

4 Now, when this case started out Mr. Skaiff, on behalf  
5 of Kroger, said that it's an issue of responsibility, and I  
6 agree. We just see it differently.

7 In this case what you have heard is that there has  
8 been a condition in the floor that you all have seen. We  
9 didn't go with you, so we really don't know what you did and  
10 what you looked at and whatnot, but there's a condition there  
11 that Kroger does not have a explanation as to why it is  
12 there, okay? And, so, we have brought into this courtroom an  
13 expert to offer his opinion, and his opinion, based on his  
14 experience based on over a thousand fall investigations, said  
15 this is unsafe.

16 And his opinion was essentially there are two  
17 characteristics. One, it's a slight deviation. We're not  
18 suggesting that it's like falling down a manhole shaft,  
19 because then perhaps she would have been on a duty to have  
20 seen it in advance. Second, the texture of it is different,  
21 and what he described was it grabs your foot. And those  
22 two -- the combination of those two characteristics are what  
23 the evidence has shown happened to Mrs. Aaron.

24 Now, Mrs. Aaron described what she felt as she fell.  
25 Now, Kroger said to her, "You didn't look down at the moment



1 that you fell, so you can't say that was what you actually  
2 stepped on." Well, nobody is going to look down when they're  
3 carrying a watermelon and they turn the corner and their foot  
4 jams. They're not going to do that. When she was on the  
5 ground she said, "That's what it was, because I remember what  
6 I felt."

7 She went back to the store in September, 2010,  
8 and -- after she was out of therapy -- and she went back and  
9 she rubbed her foot again to confirm in her own mind, "Was  
10 that in fact what I felt?" Now, the evidence in the case is  
11 that the condition was the same, so fortunately we're not in  
12 a situation where she was going back, you know, a couple  
13 months later and everything had changed. The evidence was  
14 that it was in the same condition.

15 Kroger, I anticipate, is going to say, "Well, she  
16 doesn't know what she fell on because the moment she was  
17 falling she couldn't say it was that." Well, folks, I'm  
18 going to show you what you've already seen in evidence.

19 This first is from the Kroger eye witness. What  
20 does he say? He says he sees her falling right there where  
21 that line is. Right there is the cement drain plug, and  
22 right there is her watermelon, okay?

23 Now, she came around -- by her own testimony, she  
24 came around that corner, jammed her foot there, smacked her  
25 leg on the border, and flew over here, okay? Now, those two

1 stories line up. There is no dispute between where she fell.

2 Now, keep in mind that the manager, who you heard  
3 this morning, went there and said, "I looked around  
4 everywhere very thoroughly; nothing else there." And, so,  
5 it's not a circumstance where it might have been, you know,  
6 she slipped on a grape or she might have slipped in water.  
7 The thing, the one thing everybody agrees, is that in the  
8 area where she fell there was one thing and one thing only,  
9 that spot.

10 When we're talking about responsibility and when  
11 you're deciding the issue of negligence, one of the things  
12 that I would ask you to pay very close attention to when the  
13 Judge gives you instructions -- because one of the  
14 instructions is going to tell you that the store videotapes  
15 were destroyed after we sent a letter asking them to be kept,  
16 and so the Judge will tell you that on June 3rd, 2010, the  
17 videotape from this store was destroyed after I sent the  
18 letter. So, two things happened when I sent that letter.  
19 One, a videotape is born. Two, they then created their  
20 incident report. The incident report at the very bottom  
21 makes it as clear as day -- if it wasn't already intuitive  
22 based on your common sense -- they're responding to a claim.

23 Mr. Ryan -- Ryan Walters said all he remembered  
24 Mrs. Aaron say was that she didn't know what had happened and  
25 she was confused. Well, she had just broken her pelvis.

1 It's a very sudden event. And that's what he recalled.

2 If you recall what Mr. Heath said, Mr. Heath said,  
3 "All I remember her saying was she didn't know what  
4 happened." Then they take out the incident report, prepared  
5 for litigation, and give it to him, and now he starts  
6 remembering these statements.

7 You know, let's look at the first statement. She  
8 doesn't know what she tripped -- she doesn't -- she fell on  
9 her own, and she didn't trip. That's one. Then later,  
10 "tripped over her own feet." And then you get to the one,  
11 "She tripped over her own feet and said it was all her fault  
12 and not ours." Who writes that? I mean, I've been accused  
13 by the Judge -- that's how I write. I'm a lawyer. Those are  
14 the things that I say; those aren't the things that someone  
15 like Mrs. Aaron ever would have said.

16 Now, the details of the fall are important because  
17 they explain in much detail what happened as you reconstruct  
18 it. One of the instructions you're going to get is called  
19 "Circumstantial Evidence," okay? Mrs. Aaron told you,  
20 uncontradicted, what she felt. They also -- uncontradicted,  
21 she said she felt the same thing when she went back. There's  
22 nothing else in that spot that can or did cause her to fall.  
23 You use your common sense in making those determinations.

24 Now, another piece of proof that's very important is  
25 the location where the watermelon lands, okay? Now, just

1     imagine somebody's foot jams and they're going to throw the  
2     watermelon forward. And that's what everybody said happened.  
3     And there was some confusion about whether or not it fell in  
4     this area and whether or not that would have obscured -- you  
5     know, whether it was wet before or after. But the witnesses  
6     said it fell way down here (indicating).

7             Importantly, her wristwatch, one of those bracelet  
8     wristwatches, went off her arm. That was the suddenness of  
9     this mechanism. And what you've got to consider is the two  
10    characteristics that made this unsafe that the only expert  
11    has testified concerning in this case, and that is you've got  
12    a situation that's a slight deviation. And you all have seen  
13    it. It's a slight deviation, different material, which  
14    catches her foot; therefore, she's sent forward.

15            She doesn't land on her stomach because then she  
16    hits the border. Everybody has explained on her right leg  
17    where that injury was, and she explained -- probably more  
18    than you-all wanted to hear -- about a blackened big toe.  
19    But the blackened big toe is significant because it explains  
20    exactly what she's saying; how that foot jammed and how she  
21    fell forward.

22            When you heard Dr. Harrison testify he told you that  
23    he had gone there, he had performed certain things based upon  
24    his experience, and he reached the conclusion that this was a  
25    safety defect that, in fact, Kroger caused because the plug

1 was in there ahead of time. When they took it over they put  
2 the tile around it, and Dr. Harrison told you all they had to  
3 do was put a piece of tile over it.

4 Mr. Heath this morning told us it serves no purpose.  
5 It's not decorative. It's just a blemish in the floor that  
6 they can't account for, and it should never have stayed.  
7 Now, the two witnesses who looked at it, Mr. Harris from  
8 Kroger -- he told you he's not a safety expert. Mr. Heath  
9 said he's not a safety expert or a professional. What these  
10 people are -- they're store managers, okay? They do have a  
11 facilities -- engineering facilities in Roanoke. Where were  
12 they?

13 THE COURT: This is not a scientific case, ladies  
14 and gentlemen. There's no scientific evidence whatsoever  
15 that's been admitted. What we're dealing with is a question  
16 of an expert who is an expert in safety, allegedly, and he  
17 has indicated that there was a defect on this floor. It has  
18 nothing -- there were no scientific things done at all. It  
19 didn't have anything to do with civil engineering.

20 Let's move along.

21 MR. WILSON: Right. And, so, you did not hear a  
22 counter-expert, but you did hear that they do have this  
23 department within Kroger. Remember you were told that they  
24 have 2500 stores in 31 states, and they have this department,  
25 and nobody apparently thought to consult them in this case.

1           Now, when you get to the point of deciding liability  
2 what you will be able to consider are, based on the Court's  
3 instructions, the circumstantial evidence, have you heard a  
4 plausible counter-explanation, do you believe the credibility  
5 of the witnesses, okay?

6           Now, we were told that for Mr. Heath this was  
7 immediately a suspicious and questionable incident, which is  
8 the way he characterized it, but that's, of course, the  
9 perspective he was writing his report from, and it also  
10 explains some of the things that he put in it, such as he  
11 didn't have the right location of the fall to put it away  
12 from where that cement drain plug was. It was all the  
13 slip-resistant tile. He never mentioned the cement drain  
14 plug. He had some of the other facts just wrong.

15           And you have the opportunity to say what was the  
16 impact of that letter. The impact of that letter was, one,  
17 let's get rid of the videotape, and, two, let's put words in  
18 Margaret Aaron's mouth. She's an 85-year-old woman, and they  
19 perhaps didn't expect her to come here today. And that's  
20 what we're here for.

21           Now, you will also have the opportunity when  
22 deciding the issue of negligence to infer -- you're not  
23 required to, but infer or assume that the reason the tapes  
24 were destroyed is because they would have been unfavorable to  
25 Kroger's case.

1           Now, certainly, your common sense tells you if the  
2 evidence would have been helpful why would it have been  
3 destroyed. The evidence -- if she had tripped over her own  
4 feet, as they've alleged, why not keep the tape? It would  
5 prove their theory of the case. Why, when you have been put  
6 on notice of a potential claim, would a party destroy the  
7 video evidence?

8           And what we have now is Mr. Skaff is going to get up  
9 and say, "Oh, she can't tell that's exactly where she fell"  
10 and whatnot, even though the store employee, one of the  
11 witnesses we were able to summons, says that's where it was.  
12 But you're allowed to infer that the videotapes that are no  
13 longer here, even though they were specifically requested so  
14 we could show what happened and we weren't going through all  
15 of, "Did she actually fall here or there" -- we no longer  
16 have that opportunity.

17           Now, you're going to get to the point, I hope and I  
18 assume, that you're going to think about the damages and the  
19 injuries that Mrs. Aaron suffered as a result of her fall.  
20 The Court will provide you a standard instruction which  
21 discusses which elements you are to consider.

22           Now, we are not saying that Mrs. Aaron is completely  
23 disabled. She's sitting here. She's a tough lady.  
24 Getting -- you know, old is not for the timid, okay? But  
25 what we are saying is that she now has limitations in her

1 life that she didn't have before.

2           You heard from her doctor, Dr. Davis, who explained  
3 that she will no longer regain her functionality. He called  
4 it, "This is her new baseline," and he said, "This is where  
5 she is." And my point is, well, she should be where she was.

6           She talks about things such as needing a cane,  
7 something -- an assistive device. You heard the doctor from  
8 Harvard Medical School, Massachusetts General. She just  
9 happened to see him for his examination prior to this. And  
10 what did he describe? He described somebody -- "A great exam  
11 for somebody who is 85; strong arms and legs, walks well."  
12 All of those things he observed not knowing, as no one would,  
13 that that was going to be used in this courtroom to define,  
14 very helpfully, exactly what she lost. Because those are the  
15 things she lost. She no longer walks well. She requires the  
16 use of a cane. She no longer has strong arms and legs  
17 because she has exercise limitations now. She told you she  
18 used to walk on the beach. She used to go swimming. She  
19 used to do a lot of things that she no longer can do, and you  
20 heard her doctor explain much of that.

21           What I would suggest to you is when you heard  
22 Kroger's questioning on that doctor, Dr. Davis, by videotape,  
23 the line of questioning was essentially, "Doctor," you know,  
24 "did she show any manifestations of her injuries in these  
25 subsequent visits?" And he would ask each time, "Other than



1 the fact that she's using a walker? Other than the fact that  
2 she's using a cane?" And Kroger's response was, essentially,  
3 "Well, yeah, other than those things." And I would say  
4 that's the equivalent of saying, "But other than that,  
5 Mrs. Lincoln, how was the play?"

6 The fact that she now needs that cane is much more  
7 significant than Kroger is at least admitting to itself and  
8 admitting to you. Mrs. Aaron has explained it to you. I  
9 don't use a cane, but I understand, from what the testimony  
10 she gave is, she's afraid to go even on the beach. Simply  
11 putting it down on any soft areas now are things that concern  
12 her. Her husband explained they don't go to movies because  
13 she's concerned about walking down the dark aisle. They  
14 don't want to have to climb over people. And everything, as  
15 he said, is now a process.

16 And she has described how she has some sleep  
17 problems now. She no longer cooks. She said she felt like  
18 one of her grandchildren caught her doing brownie mixes or  
19 something from a box, as opposed to a from-scratch type  
20 desert, and that hurt her because that wasn't who she was.

21 THE COURT: You have five minutes left.

22 MR. WILSON: Yep, and I'm finishing.

23 And you will see the jury instructions. When you  
24 see the jury instruction what will you be entitled to? To  
25 fully and fairly compensate her. That is what the

1 instruction will say, and it will list things that you are to  
2 consider that are proven by the evidence. And when you fully  
3 and fairly compensate her remember who she is individually  
4 and what she has lost.

5           You know the easiest category is the stipulated  
6 medical bills. I had the opportunity to read each one of  
7 them to you. There was the actual injuries itself, 30 days  
8 in either a hospital or a rehabilitation center. But that  
9 was just the beginning of the inconvenience. When she gets  
10 home now all these other things she is living with.

11           She has now permanent limitations going forward, and  
12 there was no contrary medical evidence. That is what was  
13 said, and that is what she has described, and her husband has  
14 described the same thing. There is no contrary evidence.

15           It's very difficult for jurors, for anybody, to put  
16 a dollar value on what is basically pain and suffering,  
17 inconvenience, limitations going forward, and those types of  
18 categories which really don't express themselves well in  
19 finite terms, but that is why we have jurors. You all draw  
20 upon your experience. There are no limitations on what you  
21 consider so long as it's supported by the evidence.

22           And when you're looking through the evidence keep  
23 one thing in mind: This is a lady who was physically strong,  
24 fortunately, and blessed to be a self-sufficient 85-year-old,  
25 and she's no longer that person. And she's no longer that

1 person because there's absolutely no question what she fell  
2 over, okay?

3 And, so, I may get a chance to talk to you, as long  
4 as I still have a few more minutes left, but until then I  
5 thank you, and I look forward to speaking to you very quickly  
6 later.

7 THE COURT: You have 25 minutes.

8 MR. SKAFF: Yes, sir.

9 May it please the Court, first off, on behalf of  
10 Kroger just let me say thank you for your time and attention  
11 during the course of the trial as well. You've been a very  
12 attentive group, and we do appreciate your help in coming  
13 here and resolving this case for us today.

14 Secondly, let me just say right off the bat  
15 Mrs. Aaron is a very nice woman. She has a very nice family.  
16 They came in here and did exactly what you would expect; they  
17 testified favorably for their mother and their wife.

18 And, as you've heard, it's undisputed that on  
19 June the 3rd, 2010, she fell in the Kroger store on Shore  
20 Drive, and she suffered significant injuries as a result. As  
21 you have seen, we didn't waste your time by bringing another  
22 doctor in here or the Court's time to put on any evidence on  
23 that issue, because we submit that she was injured as a  
24 result of her fall. And we hope that you don't get to the  
25 issue of damages in the case, but if you do we would ask that

1 you look to, really, the only nonbiased, objective testimony  
2 on the issue of damages, and that would be Dr. Davis's  
3 testimony.

4           And Dr. Davis's testimony is that he sees her on a  
5 regular basis and that he (sic) wasn't making any complaints  
6 to her (sic) for neurological issues or anxiety and  
7 depression and that she wasn't making any complaints of  
8 fatigue and that sort of thing. Really, he said that he  
9 believed that she was slowing down. And, by all accounts,  
10 she was a very active 85-year-old woman, and we don't dispute  
11 that. But I would submit to you that as we get older all of  
12 us, including me, slow down a little bit.

13           What is disputed and what is highly contested by  
14 Kroger is the fact that Kroger is responsible for these  
15 injuries. And from our viewpoint, at least, this is a case  
16 about liability and who is really responsible for what  
17 happened on June the 3rd of 2010. And, again, keep in mind  
18 that you have seen and heard all of the evidence that you  
19 need to decide in this case.

20           The Court made a ruling with regard to some  
21 videotapes and is going to give you an instruction that I  
22 really can't say a whole lot about, even though I wish I  
23 could. But you've got to trust me that that instruction is  
24 not evidence in this case, and it doesn't prove anything.

25           All you could have and you would need -- all that

1 you could have had and all that you need to decide this  
2 case -- you've been out to the site, you've seen the site.  
3 It hasn't changed one bit since the accident. You've seen  
4 all the photos, you've seen all the documents, you've seen  
5 the testimony that was put before you in the courtroom. In  
6 addition, you already have the other things you need to  
7 decide this case -- your common sense, your life  
8 experiences -- and we would ask that you consider those when  
9 you're deliberating.

10 Now, Judge Doumar will instruct you that from a  
11 liability perspective there's three issues that you've got to  
12 decide: One, was Kroger negligent; two, was Kroger's  
13 negligence the cause of her fall; and was the plaintiff  
14 contributorily negligent. And I'd like to go through those,  
15 each of those, with you for a moment.

16 On the issue of negligence it's important to  
17 understand -- and the Judge will instruct you on this  
18 point -- the fact that there was an accident and that the  
19 plaintiff was injured does not in and of itself entitle the  
20 plaintiff to recover. And, as you might imagine, that means,  
21 simply, that just because Mrs. Aaron fell in Kroger doesn't  
22 mean Kroger is responsible. It is her burden to prove to you  
23 by a preponderance of the evidence or the greater weight of  
24 the evidence, as Mr. Wilson said -- he used the scale  
25 analogy. I'll use the analogy of the 50-yard line on the

1     football field; you've got to get the ball over the 50 -- and  
2     did Kroger fail to use ordinary care.

3             And in cases such as this, as you're going to hear  
4     from the Judge, Kroger does not guarantee the safety of those  
5     who come into the store but is required to have the store in  
6     a reasonably safe condition and warn of any conditions  
7     that -- any dangerous conditions that it knew about or should  
8     have known about unless the condition is open and obvious to  
9     a person using ordinary care for their own safety.

10            So, the issue for you to decide -- and we would  
11     submit to you that this is the issue in this case: Is this  
12     cement drain cover a dangerous condition? And we would  
13     submit to you that it's not. You all got a chance to take a  
14     look at it firsthand, and I think you would agree with me  
15     it's not perfect, it's not particularly pretty to look at,  
16     and we don't really have a good explanation why it still  
17     exists.

18            But a dangerous condition or a trip hazard? I don't  
19     think so. You've heard and seen that it's about seven inches  
20     across, maybe a quarter inch deep at one very small -- I  
21     think the only testimony is one small pencil point on the  
22     edge. But we come across these major -- we come across minor  
23     imperfections in floors and sidewalks every day, if not every  
24     hour. Our world is not flat. Christopher Columbus taught us  
25     that. I must have encountered at least -- at least -- a

1 dozen things more significant than this on my walk over to  
2 the courthouse today, and I would bet you did, too.

3 The cement drain spot has concrete right next to  
4 tile. It's a slight change in texture, but, again, we deal  
5 with that every day. Just because it's not perfect doesn't  
6 make it dangerous. We don't live in a perfect world. Again,  
7 I think we could all agree on that.

8 Think about where we're headed with our businesses  
9 and our homes if under Virginia law that's a dangerous  
10 condition. For example, look in this courtroom. Right down  
11 here we have carpet. On top of the carpet we have a wire.  
12 On top of the wire we have black electrical tape. A slight  
13 condition? Yeah. A change in texture? Yes. But if I trip  
14 over that should I be able to come here and ask you to award  
15 me damages against the federal government? I would submit to  
16 you no.

17 Now, Dr. Harrison came in here -- a hired gun, I'll  
18 call him, if you will -- and basically told you everything  
19 you already knew and everything you could have done when you  
20 were at your site visit. You heard his testimony. All he  
21 did was go out to the site, do a visual inspection, he did a  
22 few measurements, he drew something on a picture, and then he  
23 simply offered the opinion it wasn't safe because it was  
24 imperfect and he would have done it a different way. But, as  
25 I've already discussed with you, Virginia law does not

1     require that.  Virginia law does not require perfection.

2             And, anyway, we didn't -- and that's why we didn't  
3     hire someone.  We didn't hire someone to come in here and  
4     tell you what we would submit that you yourselves, since you  
5     don't have a bias in this case of at least \$400 an hour --  
6     after your site visit that you are better suited to make a  
7     determination about whether or not this is a dangerous  
8     condition under Virginia law.

9             And, again, I anticipate that the Judge is going to  
10    instruct you in a few moments on this particular point.  If  
11    you find by a preponderance of the evidence that the  
12    condition in question was so slight or ordinary that no  
13    careful or prudent person would reasonably anticipate any  
14    danger from its existence, then as a matter of law there's no  
15    actionable negligence.

16            And you heard the Kroger witnesses come in here and  
17    tell you that they knew that was there.  They've known since  
18    2000, but they didn't see anything dangerous with it.  They  
19    had never been given any citations for it; it passed  
20    inspections, it passed inspections internally.  They rubbed  
21    their foot across it, just as you may have done when you were  
22    out there.  Don't you think that Kroger -- if that was  
23    dangerous that they would have done something to correct it?

24            And, as I said, basically, we submit to you that  
25    that's the main issue in this case.  That's what this case is



1 really all about, something that hasn't changed since 2000,  
2 really. It's still in existence, and you got to see it.

3 But there are other issues that we believe are in  
4 Kroger's favor, and the second one is causation. Mrs. Aaron  
5 has to prove to you -- she has the burden to show that that  
6 cement drain cover is what caused her to fall, and I would  
7 submit to you that since we don't know she's failed to meet  
8 that burden. There were no real eyewitnesses to the fall or  
9 at least the cause of the fall, so the only thing we really  
10 have is the plaintiff's own testimony, and she herself said  
11 she really doesn't know.

12 She said she reached in, got a watermelon, she  
13 walked around the display, she comes back and she trips and  
14 falls, saying that her left foot got jammed on something but  
15 she doesn't know what. She blames it on the cement drain,  
16 but she never saw it before, she never saw it during the  
17 course of her fall. The first time that she saw it was after  
18 her fall. And, in her own words -- and I don't blame her for  
19 this, but in her own words began looking for reasons that --  
20 as to "What happened to me." And again using her own words,  
21 she assumed that it had to have been that drain because there  
22 was nothing else there. I mean, again, I don't fault her for  
23 that, but I think that may be human nature.

24 I guess really -- you know, I've tried to think  
25 about that. I guess the best evidence is the testimony that

1 she had a black toe after a fall, and it's argued that she  
2 jammed her foot in there and that's what caused the black  
3 toe. We don't know that. We don't have any evidence of  
4 that. It's a lot of speculation, again, that that's why it  
5 happened, and I would submit to you that in tennis shoes such  
6 as the ones that she was wearing, on non-slip tile, that her  
7 foot could just as easily have jammed into the floor. I  
8 would submit to you that, given her medications and her age,  
9 she could just as easily have bruised her toe in the fall  
10 itself and had nothing to do with the drain.

11 I would submit to you that perhaps she reached up  
12 when she reached in -- she's a smaller person. When she  
13 reached into the bin to get the watermelon and she raised up  
14 and she turned the corner that she became light-headed and  
15 simply lost her balance.

16 And maybe she hit her shin on the right -- on the  
17 border as she came across there. I mean, maybe that explains  
18 the cut to her right shin. Remember, Ryan Walters said --  
19 and he's really the only one that saw this after -- he didn't  
20 see what caused it, he saw her after she started to fall, and  
21 he didn't see her hit the black border at any point.

22 And keep in mind that -- and with regard to  
23 Mr. Walters' testimony, you know, the evidence in the case  
24 was that these little black squares are a foot -- you know, a  
25 foot square, and she's at least four feet tall; that, you

1 know, she would have been in the same area had she started to  
2 fall back in here somewhere (indicating).

3 And keep in mind that according to Dale Heath and  
4 Ryan Walters she really didn't know what happened after the  
5 fall and said that she may have even tripped over her own two  
6 feet. As such -- you know, at that point they didn't think  
7 there was a whole lot -- you know, Mr. Heath said he didn't  
8 think there was a whole lot that he had to do with regard to  
9 the incident because he -- you know, he didn't know that  
10 anybody was blaming Kroger as a result of it. And with  
11 regard to these reports and Mr. Wilson's statement with  
12 regard to the attorney -- you know, "This is prepared in  
13 anticipation of litigation" and all that stuff -- I mean,  
14 keep in mind that that's just stuff -- Mr. Heath testified  
15 that that -- he prints off those documents and fills them  
16 out. That's not something that he did. I mean, he didn't  
17 put that there. Does he seem -- he didn't strike me at all  
18 as the kind of guy who would just make up stuff. And, in  
19 fact, he testified that he didn't. He tried to recall, he  
20 said, the best he could as to writing down what was said  
21 after the fact of the accident to make a record of it.

22 Because in the week -- one week after the accident  
23 Mrs. Aaron had already hired an attorney to represent her to  
24 go after Kroger. And even then there was no indication to  
25 Kroger what that was all about. They didn't know. I mean,

1 they didn't know it had anything at all to do with the drain  
2 at that point, and I would submit to you that it wasn't until  
3 Mrs. Aaron went in there a month or two later and saw this in  
4 the floor in the area and said, "Yeah, that had to have been  
5 it."

6           And the point being in all of that is this: We --  
7 no one really knows what caused her to fall because we didn't  
8 see it, and it's total speculation that this cement drain was  
9 the cause of her fall. And keep in mind, again, it's the  
10 plaintiff's burden to prove that to you. And if she can't,  
11 even if you think it's a 50/50 split, she hasn't met her  
12 burden, and I would submit to you that she's failed to prove  
13 her case and you have to find in favor of Kroger on that  
14 point as well.

15           The final issue that I think is important for you to  
16 address in this case is one of contributory negligence. And  
17 on this issue it is our burden, Kroger's burden, to prove to  
18 you that the plaintiff failed to use ordinary care for her  
19 own safety on the date of the accident. And it's important,  
20 I think, for you to understand what the law is on this point.  
21 And, again, we expect Judge Doumar is going to instruct you  
22 this way, but basically -- and even though it sounds harsh --  
23 even if the plaintiff is one percent contributorily negligent  
24 and that negligence was the cause of her fall, she cannot  
25 recover against Kroger.

1           A jury instruction tells you that, and, also, if you  
2 find that both Kroger and Mrs. Aaron were negligent you don't  
3 compare that negligence, the plaintiff cannot recover, and  
4 you return a verdict in favor of Kroger.

5           Now, on this issue the testimony of all of the  
6 witnesses and the pictures are clear and, to me, undisputed  
7 that this cement drain cover was not in any way hidden. This  
8 was a well-lit store; it was easy to see. The plaintiff told  
9 you that she had generalized knowledge of the store. It was  
10 her store. She had been in there more times than she could  
11 count. She had been in the produce section more times than  
12 she could count. And her testimony makes clear that when she  
13 first walked into this area this is her view.

14           So she's coming down here towards the watermelon  
15 display, and she parked her cart at the far corner. You  
16 heard Mr. Harris tell you that he measured the shopping cart,  
17 and the shopping cart is at least, I think he said, two feet  
18 wide. These blocks are two feet wide -- I mean, excuse me,  
19 one foot each. She had to have pushed that cart and walked  
20 directly over that cement drain cover, or awfully near it,  
21 when she first went into that area and parked her shopping  
22 cart at the back of that -- at the back of that display.

23           Most importantly, I think, is her own testimony that  
24 the store was well lit -- you know, even Dr. Harrison said  
25 that -- and that, had she been looking, she would have been

1     able to see it and that there was nothing at all preventing  
2     her from seeing it. To me, that is the classic definition of  
3     what "open and obvious" is, and the law is clear that if she  
4     failed to navigate an open and obvious condition, then she's  
5     contributorily negligent and she can't recover.

6             I would again submit to you what would our business  
7     and home life be if people are not required to look out for  
8     things that they could have seen had they been looking? I  
9     mean, if I were to trip over this cord after I've already  
10    walked over it and I can clearly see it, should I again be  
11    permitted to come in here and ask for a lot of money? I  
12    mean, come on. I mean, I would submit no.

13            As I stated to you yesterday, we believe that this  
14    is a case about taking responsibility for one's own actions.  
15    We think that it is very clear that, using your common sense  
16    and your life experiences and all of the objective evidence  
17    put before you, that this is not a dangerous condition under  
18    Virginia law and that the plaintiff is unable to prove her  
19    burden that this is what caused her to fall, and that she was  
20    contributorily negligent and that you should return a verdict  
21    in favor of Kroger.

22            Thank you very much. We appreciate it.

23            THE COURT: Mr. Wilson, you have three minutes left.

24            MR. WILSON: Yep.

25            Four points: He brought up the expert. Had we not

1 brought in an expert to measure that, you heard from the  
2 three people who said it was totally flat. Every single one  
3 of them, in all these years, totally flat. Had we not  
4 brought that man in they wouldn't have now said, "Oh, maybe  
5 it's an eighth of an inch." That's what he came in to do.

6 I am glad to hear Mr. Skaff agree that the medical  
7 issues aren't in dispute. He suggested, "Well, she's just  
8 getting old." This is a store that offers a senior discount,  
9 and in litigation now they want to discount seniors.

10 He talked about be "open and obvious." Which is it,  
11 Kroger? Is this a condition that she should have seen was a  
12 danger; that they themselves for how many years in the store  
13 never saw it to be a danger but now they're saying she should  
14 have recognized something that they didn't see? "Open and  
15 obvious" means she sees the danger. You don't see that  
16 deviation. You don't see the texture. It's something you  
17 feel. The "open and obvious" is nothing but a smoke screen.

18 Now, he wants to -- Mr. Skaff tried to downplay the  
19 destruction of the tapes, and after -- after -- he starts  
20 saying all these other possible causes, all these other  
21 possible causes. Well, guess what? He gets to argue that  
22 now. This is the equivalent of a knock on the door and  
23 running and flushing something down the toilet, and that is  
24 simply not something that should be permitted. So,  
25 therefore, you get to take that inference and decide that to

1 the extent there are gaps that he's contending -- I don't  
2 think there are, but to the extent they are that's because  
3 the witnesses they've taken out of the courtroom.

4 And, lastly, on the "open and obvious" Mr. Skaff  
5 said if he tripped over something that he can clearly see  
6 would he be allowed to come in and sue. But here nobody said  
7 Mrs. Aaron could clearly see that there was a danger. She  
8 could see a circle. She didn't trip over it because it was a  
9 circle. She could see it was a different color. She didn't  
10 trip over it because it was a different color. It was things  
11 that could not be visibly perceived. It was only by feel.

12 Folks, thank you very much.

13 THE COURT: All right. Ladies and gentlemen, your  
14 lunch is here, and I don't want to interfere with your lunch.  
15 It will take me approximately 25 minutes to read these  
16 instructions. Would you rather go eat your lunch and come  
17 back -- you'd rather have the instructions? All right.

18 Now that you've heard all of the evidence and the  
19 arguments of the lawyers in this case, we've got -- I wish we  
20 never had the age of the Internet with all of these fancy  
21 things.

22 It's my duty to tell you what the law is. It's your  
23 duty as jurors to follow the law as I shall state it to you.  
24 Now, you don't have to take notes. I'm going to give you  
25 these instructions, so you won't have to worry about taking



1 the notes. I have to read them, however; it's required.

2 It's your duty as jurors to follow the law as I  
3 shall state it to you and to apply that law to the facts as  
4 you find them from the evidence in the case. What the  
5 lawyers may say in their arguments is not necessarily  
6 evidence. It may be their view of the evidence. You heard  
7 the evidence. You heard the witnesses testify. It's you who  
8 will determine what they said or didn't say. I want to  
9 emphasize that.

10 You're not to single out any one of my instructions  
11 as stating the law but must consider them as a whole.  
12 Neither are you to be concerned with the wisdom of any rule  
13 of law I may state to you. Regardless of any opinion you may  
14 have as to what the law is or ought to be, it would be a  
15 violation of your sworn duty to base a verdict upon any view  
16 of the law other than that given in the instructions of this  
17 Court, just as it would also be a violation of your sworn  
18 duty as judges of the facts to base a verdict upon anything  
19 other than the evidence in the case.

20 In deciding the facts of this case you must not be  
21 swayed by sympathy for any party nor bias or prejudice or  
22 favor as to any party. Our system of law does not permit  
23 jurors to be governed by prejudice, sympathy, bias, guesswork  
24 or speculation. You're expected to carefully and impartially  
25 consider all the evidence in the case, follow the law as

1 stated by the Court, and reach a just verdict regardless of  
2 the consequences. It's your duty to determine the facts, and  
3 in so doing you must consider only the evidence that I've  
4 admitted in the case.

5 It is your own recollection and interpretation of  
6 the evidence that controls in this case. The evidence in  
7 this case consists of the sworn testimony of witnesses,  
8 regardless of who may have called them, and all of the  
9 exhibits received in evidence, regardless of who may have  
10 produced them, and all of the facts which have been admitted  
11 or stipulated.

12 I think there was one exhibit that I may have  
13 introduced, which was the exhibit concerning the place of the  
14 so-called one-quarter-inch or one-eighth-inch defect.

15 THE CLERK: This one?

16 THE COURT: Yes. You can consider that also. You  
17 can consider all the evidence, regardless of who produced it.

18 Statements and arguments of counsel are not evidence  
19 in the case unless made as an admission or stipulation of a  
20 fact. When the attorneys on both sides stipulate or agree as  
21 to the existence of a fact, however, you must, unless  
22 otherwise instructed, accept the stipulation as evidence and  
23 regard the fact as proved.

24 It's the duty of the lawyer on each side of the case  
25 to object when the other side offers testimony or other

1 evidence which the lawyer believes is not properly  
2 admissible. You should not draw any conclusions or be  
3 prejudiced against a lawyer or the party he represents  
4 because of the making of an objection.

5 Any evidence as to which an objection was sustained  
6 by the Court and any evidence ordered stricken by the Court  
7 must be entirely disregarded. Anything you may have seen or  
8 heard outside the courtroom is generally not evidence.  
9 However, you have seen the scene, and I just don't want to --  
10 I'm going to say, "except for what you've seen." I'm sorry.  
11 I'll restate that.

12 Anything you may have seen or heard outside the  
13 courtroom is generally not evidence and must be entirely  
14 disregarded, except for what you have seen. You've actually  
15 viewed the particular premises in question.

16 So while you should consider only the evidence in  
17 the case, you're permitted to draw such reasonable inferences  
18 from the testimony and exhibits as you feel are justified in  
19 the light of your common experience.

20 You, as jurors, are the sole judges of the  
21 credibility of the witnesses and the weight their testimony  
22 deserves. You may be guided by the appearance and conduct of  
23 the witness or by the manner in which the witness testifies,  
24 or by the character of the testimony given, or by evidence to  
25 the contrary of the testimony given.

1           You should carefully scrutinize all the testimony  
2 given, the circumstances under which each witness has  
3 testified and every matter in evidence which tends to show  
4 whether a witness is worthy of belief. Consider each  
5 witness's intelligence, motive and state of mind and their  
6 demeanor and manner while on the stand. Consider the  
7 witness's ability to observe the matters as to which he or  
8 she has testified, and whether he or she impresses you as  
9 having an accurate recollection of these matters. Consider  
10 also any relation each witness may bear to either side of the  
11 case, the manner in which each witness might be affected by  
12 the verdict, and the extent to which, if at all, each witness  
13 is either supported or contradicted by other evidence in the  
14 case.

15           Inconsistencies or discrepancies in the testimony of  
16 a witness or between the testimony of different witnesses may  
17 or may not cause the jury to discredit such testimony. Two  
18 or more persons witnessing an incident or a transaction may  
19 see or hear it differently, and innocent misrecollection,  
20 like failure of recollection, is not an uncommon experience  
21 in weighing the effect of a discrepancy. Always consider  
22 whether it pertains to a matter of importance or an  
23 unimportant detail and whether the discrepancy results from  
24 innocent error or intentional falsehood.

25           In deciding whether you believe or do not believe

1 any witness I suggest you ask yourself a few questions. Did  
2 the person impress you as one who was telling the truth? Did  
3 he or she have any particular reason not to tell the truth?  
4 Did he or she have a personal interest in the outcome of the  
5 case? Did the witness seem to have a good memory? Did the  
6 witness have the opportunity and ability to observe  
7 accurately the things he or she testified about? Did he or  
8 she appear to understand the questions clearly and answer  
9 directly? Did the witness's testimony differ from the  
10 testimony of other witnesses? After making your own judgment  
11 you will give the testimony of each witness such weight, if  
12 any, as you may think it deserves.

13           You have no right to disregard arbitrarily the  
14 believability of any testimony of any witness. You may  
15 discard or accept, in whole or in part, the testimony of any  
16 witness when you consider it in connection with the other  
17 evidence in the case. You are entitled to use your common  
18 sense in judging any testimony. From these things and all  
19 other circumstances of the case you may determine which  
20 witnesses are more believable and weigh their testimony  
21 accordingly. After making your own judgment you will give  
22 the testimony of each witness such weight, if any, as you may  
23 think it deserves.

24           In considering the weight to be given to the  
25 testimony of an expert witness you should consider the basis

1 for his opinion and the manner by which he arrived at it and  
2 the underlying facts and data upon which he relied. An  
3 expert witness is to be judged by the same standard as any  
4 other witness.

5           Circumstantial evidence is -- any fact that may be  
6 proved by direct evidence may be proved by circumstantial  
7 evidence. That is, you may draw all reasonable and  
8 legitimate inferences and deductions from the evidence that  
9 you've heard.

10           The plaintiff, Mrs. Aaron, has the burden in this  
11 civil action to prove every essential element of her claim by  
12 a preponderance of the evidence. If Mrs. Aaron should fail  
13 to establish any essential element of her claim by a  
14 preponderance of the evidence you should find for the  
15 defendant, the Kroger company, as to that claim. Mrs. Aaron  
16 has made a claim against the Kroger company for personal  
17 injury based on negligence. She must establish this claim by  
18 a preponderance of the evidence, which means she must prove  
19 that something is more likely so than not so.

20           In other words, a preponderance of the evidence  
21 means such evidence, as when considered and compared with the  
22 evidence opposed to it, has more convincing force and  
23 produces in your mind a belief that what is sought to be  
24 proved is more likely true than not true.

25           You may have heard the term "beyond a reasonable

1     doubt." That is a stricter standard that applies in criminal  
2     cases. It does not apply in civil cases such as this. You  
3     should, therefore, put it out of your minds.

4             Your verdict must be based on the facts as you find  
5     them and on the law contained in all of these instructions.  
6     The issues in this case are: One, was Kroger negligent; two,  
7     if Kroger was negligent was its negligence a proximate cause  
8     of the accident? On these issues the plaintiff has the  
9     burden of proof. Then, three, was the plaintiff negligent?  
10    If so, was her negligence the proximate cause of the  
11    accident? On these issues the defendant has the burden of  
12    proof. And, lastly, if the plaintiff is entitled to recover  
13    what is the amount of her damages? On this issue the  
14    plaintiff has the burden of proof.

15            An invitee is one who visits premises lawfully at  
16    the express or implied invitation of the occupant. He or she  
17    is one who visits other than for a social purpose.

18            Both the plaintiff and the defendant have a duty to  
19    exercise reasonable care in performing the duties defined in  
20    these instructions. Reasonable care is the care that a  
21    reasonable person would exercise under the same or similar  
22    circumstances.

23            An invitee has a right to assume the premises are  
24    reasonably safe. An occupant of premises such as the Kroger  
25    company does not guarantee an invitee's safety; rather, it

1 has the duty to use ordinary care to have the premises in a  
2 reasonably safe condition for an invitee's use consistent  
3 with the invitation, unless the invitee knows or should have  
4 known of an unsafe condition, and to use ordinary care to  
5 warn an invitee of any unsafe condition about which the  
6 occupant knows or by the use of ordinary care should know,  
7 unless the unsafe condition is open and obvious to a person  
8 using ordinary care for her own safety. If an occupant fails  
9 to perform either or both of these duties then it is  
10 negligent.

11           If you find by a preponderance of the evidence that  
12 the condition in question was so slight or ordinary that no  
13 careful or prudent person would reasonably anticipate any  
14 danger from its existence, then as a matter of law there's no  
15 actionable negligence.

16           The word "proximate" as used in these instructions  
17 in defining proximate cause is a legal term. It does not  
18 mean approximate, with an A in front. It is a cause of an  
19 accident, injury or damage and one which in natural and  
20 continuous sequence produces the accident, injury or damage.  
21 It is a cause without which the accident, injury or damage  
22 would not have occurred.

23           Contributory negligence is the failure to act as a  
24 reasonable person would have acted for her own safety under  
25 the circumstances of the case. When the defendant, the



1 Kroger company, claims contributory negligence as a defense  
2 the Kroger company has the burden of proving by a  
3 preponderance of the evidence that the plaintiff was  
4 negligent and that this negligence was a proximate cause of  
5 the plaintiff's injuries.

6 If you find from the greater weight of the evidence  
7 that both the plaintiff and the defendant were negligent and  
8 their negligence proximately contributed to the accident, you  
9 may not compare the negligence of the parties. Any  
10 negligence of the plaintiff which was a proximate cause of  
11 the accident will bar the plaintiff from recovery.

12 There may be more than one proximate cause of an  
13 injury or damage. The fact that there was an accident and  
14 the plaintiff was injured does not of itself entitle the  
15 plaintiff to recover. If you find that the condition was an  
16 open and obvious condition and this should have been avoided  
17 by the plaintiff exercising reasonable care for her own  
18 safety, then the plaintiff is guilty of contributory  
19 negligence.

20 You are permitted but not required to infer that the  
21 store's June 3rd, 2010, surveillance videotapes would have  
22 been unfavorable to Kroger's theory of the case based on  
23 Kroger's destruction of the videotapes after the store  
24 manager had received an evidence preservation letter from the  
25 attorney. If you do draw an adverse inference against Kroger

1 from its conduct, then you may consider that inference with  
2 the other evidence to decide the question of negligence.

3 You shall find your verdict for the plaintiff if she  
4 has proved by the greater weight of the evidence that, one,  
5 the defendant was negligent, and that the defendant's  
6 negligence was a proximate cause of the plaintiff's accident  
7 and damages.

8 You shall find your verdict for the defendant if the  
9 plaintiff failed to prove either or both of the two elements  
10 above or if you find by the greater weight of the evidence  
11 that the plaintiff was contributorily negligent and that her  
12 contributory negligence was a proximate cause of the  
13 accident.

14 This is really a simple case. The question is was  
15 the accident caused by whatever defect is claimed in the  
16 drain. That's what this case is about. And the question is  
17 whether Kroger knew of this defect and failed to warn the  
18 defendant of the defect or failed to take proper action to  
19 rid itself of the defect.

20 The question, really, you're going to have to  
21 decide -- and these are my comments -- is the fact that you  
22 have to determine if this defect caused Mrs. Aaron to fall.  
23 And that is the real test in this case, to determine that.  
24 The question is was the defect negligent, and, if so, did  
25 this defect, whatever it was -- because I'm having -- well, I

1 have some problems with it, and I'm sure you have. But you  
2 have done something that I haven't done. I haven't seen the  
3 drain. Each and every one of you have seen the drain.  
4 You'll see whether it's defective just as an ordinary person  
5 would look at it, you know?

6 Kroger is required to use reasonable care to provide  
7 a safe way to walk. It is not something that is absolute  
8 that they have to do, it's what they have to do as a  
9 reasonable person. And although they're not a person, they  
10 are tested just as if a person would be tested.

11 And remember, my comments are not the law. The law  
12 is as stated in these instructions.

13 If you find your verdict for the plaintiff, then in  
14 determining the damage to which she is entitled you should  
15 consider any of the following which you believe by a  
16 preponderance of the evidence was caused by the negligence of  
17 the defendant, the Kroger company, by and through its  
18 employees:

19 One, any bodily injury sustained by the plaintiff  
20 and their effect on her health according to their degree and  
21 probable duration; any physical pain and mental anguish that  
22 the plaintiff suffered in the past and any that she may be  
23 reasonably expected to suffer in the future; any associated  
24 humiliation or embarrassment; any inconvenience caused in the  
25 past and any that probably will be caused in the future; and,

1     lastly, the medical expenses Mrs. Aaron incurred, which  
2     amounts have been stipulated in the Plaintiff's Exhibit 25.

3             If you find your verdict for the plaintiff, your  
4     verdict shall be for such sum as will fully and fairly  
5     compensate the plaintiff for the damages she sustained as a  
6     result of Kroger's negligence, if any.

7             Your verdict must represent the considered judgment  
8     of each juror. In other words, your verdict must be  
9     unanimous. Each of you must decide the case for yourself but  
10    only after an impartial consideration of all the evidence in  
11    the case with your fellow jurors. It's your duty as jurors  
12    to consult with one another and to deliberate with a view to  
13    reaching an agreement, if you can do so without violence to  
14    your individual judgment. In the course of your  
15    deliberations do not hesitate to re-examine your own views  
16    and to change your opinions if convinced it is erroneous, but  
17    do not surrender your honest conviction as to the weight or  
18    effect of the evidence solely because of the opinions of your  
19    fellow jurors or for the mere purpose of returning a verdict.  
20    Remember at all times you're not partisans. You are the  
21    judges of the facts. You represent the public in this case.

22            Upon returning to the jury room you should first  
23    select one of your number to act as your foreman or  
24    forewoman, who will preside over your deliberations and will  
25    be your spokesperson here in court. Forms of your verdict

1 have been prepared for your convenience. You will take the  
2 verdict forms to the jury room, and when you've reached a  
3 unanimous agreement as to your verdict then you will have  
4 your foreman or forewoman fill it in, date and sign the  
5 appropriate form, and then return to the courtroom.

6           If during your deliberations you should desire to  
7 communicate with the Court your message or question must be  
8 put in writing and signed by the foreman or forewoman. And  
9 you will then give the note to Mr. Pierce, who will bring it  
10 to my attention. He won't read it. You fold it over, then I  
11 will take it. And let me tell you what I've got to do.  
12 Because I may be able to answer that question in two seconds.  
13 However, I must give the lawyers an opportunity to have their  
14 input and their expression, and sometimes that takes a long  
15 time. I just want to tell you. So if you don't get an  
16 answer that doesn't mean I don't know the answer, it means  
17 that I am giving due process to the parties that they may  
18 have their input and their objections to it. So you would  
19 know why it's taking so long, I just want you to understand  
20 that. I don't allow the attorneys to leave the courthouse,  
21 so I get them down here quickly. I can assure you that. I  
22 get them here very quickly.

23           I will respond to the question as soon as I possibly  
24 can, most likely in writing, or if it's something that  
25 requires more information I'll ask you to return to the

1 courtroom so that I can do so orally. If you do transmit a  
2 message or question to the Court you must not state or  
3 specify your numerical division. Don't tell me, "Somebody  
4 wants to do this" or "that" unless it's somebody wants to go  
5 to the bathroom. You just tell Mr. Pierce, "Somebody wants  
6 to do this" or "use that and it's crowded, and is there  
7 another bathroom" or something of that nature. We have two  
8 bathrooms in the jury room. Sometimes two or more people may  
9 want to use them at the same time, and it creates a problem.

10 And, lastly, don't interpret anything I have said or  
11 done during the trial as suggesting to you what I think your  
12 verdict should be. I'm very interested in you arriving at a  
13 verdict, but your verdict is exclusively your duty and  
14 responsibility. It's not mine. I don't pretend in any way  
15 to tell you what your verdict should be.

16 And do we have a verdict form there, Ms. Baxter?

17 THE CLERK: Yes, sir. It's on the bench.

18 THE COURT: There it is. Here's the verdict form,  
19 ladies and gentlemen. It's "In the United States District  
20 Court for the Eastern District of Virginia, Norfolk Division,  
21 Jury Verdict." It's got the case number, the person's name,  
22 verdict form. "We, the jury, find for the plaintiff and  
23 fix" -- "damages shall be fixed at" -- and you'll fill in the  
24 damages if you find for the plaintiff. "We, the jury, find  
25 for the defendant," and that's it.

1           Now, when you say -- the space here for "We, the  
2 jury, find for the plaintiff" -- you say, "Yes, we, the jury,  
3 find for the plaintiff, and damages shall be fixed at," or,  
4 "We, the jury, find for the defendant" -- you can put "Yes"  
5 or "No." You don't have to put "No" if you have found for  
6 the plaintiff, but you have to put "No" if you -- I don't  
7 know why. You wouldn't have to put "No" at all. You can  
8 say, "We the jury find for the defendant." So you have all  
9 of this.

10           You'll be getting the exhibits. The attorneys have  
11 an opportunity to correct or make any objections, so don't  
12 begin your deliberations until you get this verdict form,  
13 these instructions and the exhibits.

14           Everyone please rise while the jury retires.

15           (The jury withdrew from the courtroom.)

16           THE COURT: All right. You may be seated.

17           I'll hear from the plaintiff first. Do you have  
18 anything; Mr. Wilson, other than your prior objections?

19           MR. WILSON: I -- my prior objections. I want to  
20 add a further objection to some of the comments you made to  
21 the jury as you were instructing them in which you said you  
22 might have had --

23           THE COURT: What comment?

24           MR. WILSON: When you said, "I have serious doubts  
25 about the case, as you might as well," and you then -- so I

1 just want to put it on the record.

2 THE COURT: Did I say that? Uh-oh. Well, I do have  
3 serious doubts, but I don't decide the case.

4 MR. WILSON: Yes.

5 MR. SKAFF: I have nothing to add. My prior --

6 THE COURT: Your prior objections you adopt.

7 MR. SKAFF: Yes, sir.

8 THE COURT: Well, you may be right, Mr. Wilson. I  
9 wish I hadn't said that. But I do have serious doubts about  
10 the case, Mr. Wilson.

11 MR. WILSON: Your Honor, that's why I asked for a  
12 jury trial.

13 THE COURT: All right. We'll recess until we have  
14 something.

15 All right. Carry the exhibits in to the jury room.

16 Yes, sir, Mr. Skaff.

17 MR. SKAFF: Can I ask you a quick question?

18 You mentioned that we couldn't leave the courthouse.  
19 I need to get out of my room. Is it possible that I could  
20 run and get my stuff out of my room real quick?

21 THE COURT: Yes. They'll eat their lunch, so you go  
22 run.

23 MR. SKAFF: Yes, sir. Thank you.

24 THE COURT: Have you got a cell phone back at your  
25 room? I know you didn't bring it with you.



1 MR. SKAFF: Yes, sir, I do.

2 THE COURT: What is that number? Would you carry it  
3 with you? What's the number?

4 MR. SKAFF: 540-353-1512.

5 THE COURT: 1 what?

6 MR. SKAFF: 1512.

7 THE COURT: I may have to call you.

8 MR. SKAFF: Judge, it won't take me very long. I'm  
9 just two blocks over. I'll run over there and get my stuff  
10 and get it out.

11 THE COURT: Hustle, then. What I'm worried about is  
12 if they have a question. Okay?

13 (There was a pause in the proceedings.)

14 (The exhibits were delivered to the jury.)

15 THE COURT: All right. We'll recess until we have a  
16 verdict.

17 (A recess was taken pending the jury's verdict.)

18 THE COURT: The question that the jury has is an  
19 interesting question.

20 "What was Ms. Aaron's exact testimony regarding  
21 'falling immediately when I turned the corner' or words to  
22 that effect?"

23 The only thing I can suggest is that the court  
24 reporter read back whatever that testimony was. Anybody have  
25 any suggestion?

1           MR. WILSON: I mean, I don't -- I don't think I can  
2 paraphrase it, so, I mean, that would be the only thing -- if  
3 that's what they're asking for, that would be the only way I  
4 would know how to communicate it.

5           MR. SKAFF: Your Honor, I guess I have some concerns  
6 about that, given the fact that, you know, aren't they to  
7 just consider what they've already heard and go from there?

8           THE COURT: I'm going to allow it to be read back,  
9 Mr. Skaff. I think I'm just going to allow it.

10          Heidi, can you find it in her testimony?

11          THE COURT REPORTER: Yes, sir.

12          MR. SKAFF: If you would just note our objection.

13          The other point of that is she testified about that  
14 several times. I know she even testified to it in response  
15 to some of Your Honor's questions.

16          THE COURT: Well, she may have testified two or  
17 three times, and then I'll just have -- I don't know what she  
18 testified. I can't remember the exact testimony. But she  
19 did say, "I turned the corner" or something to that effect.

20          See what you can find on it, Heidi.

21          THE COURT REPORTER: Yes, sir, Judge.

22          THE COURT: It may be more than once that she talks  
23 about falling immediately. Let's take a check on it. I wish  
24 I had total recall.

25          (There was a pause in the proceedings.)

1           THE COURT: All right. We'll bring in the jury.  
2       Where did Mr. Wilson go?

3           MR. SKAFF: He's trying to get Mrs. Aaron.

4           THE COURT: We don't need Mrs. Aaron.

5           Everybody please rise.

6           (The jury entered the courtroom.)

7           THE COURT: This won't take but a minute. We've got  
8       the exact words. You may be seated.

9           The question is, "What was Ms. Aaron's exact  
10       testimony regarding 'falling immediately when I turned the  
11       corner' or words to that effect."

12          Would you read that portion, please, Ms. Jeffreys.

13          (The excerpt of the testimony was read by the court  
14       reporter as follows:)

15       Q. "And what course did you take to return to your shopping  
16       cart?"

17       A. "I was right here in the center, and I took that corner  
18       to turn here to go to the shopping cart.

19       Q. "Okay. And where was it that you fell?"

20       A. "Almost immediately after I had turned the corner."

21          THE COURT: That's enough. Stop.

22          Does that answer your question?

23          All right. Everyone please rise while the jury  
24       retires.

25          (The jury withdrew from the courtroom.)

1           THE COURT: We'll recess until we have another  
2 question or something, okay?

3           (A recess was taken pending the jury's verdict.)

4           THE COURT: Okay. The jury has another question.  
5 This is an interesting question.

6           It says, "Exhibit P 3D, the pallet guard, is much  
7 closer to the drain than in Exhibit P 1. Exhibit P 3D also  
8 has a date of 6-3-10. Was P 3D the more accurate of the two  
9 pictures? Do we know the date of Exhibit P 1?"

10          MR. SKAFF: Your Honor, I don't -- there was no  
11 testimony about any of that issue. The only issue -- and the  
12 pictures with the date on them are -- they were never  
13 discussed.

14          THE COURT: Nobody testified as to the dates of the  
15 pictures.

16          MR. SKAFF: That's right.

17          THE COURT: Isn't that true, Mr. --

18          MR. WILSON: Yeah. The testimony -- every one of us  
19 asked, "Does P 1 show the conditions as of the date of the  
20 accident," and all the witnesses were saying, "Yes." That's  
21 what they used. P 3D -- they were using a different type of  
22 camera.

23          THE COURT: Would somebody tell me what the pallet  
24 guard is they're talking about?

25          MR. SKAFF: The black board.

1           MR. WILSON: The testimony has been in the case that  
2 P 1 -- nobody has discussed P 3, so P 1 is more accurate of  
3 the two.

4           THE COURT: I can't say which is more accurate. I'm  
5 just not going to say, because then I'll be testifying. I  
6 can't do that. I can do it if you agree on it.

7           MR. SKAFF: Well, I think -- I think, given the  
8 testimony, that we'd have to say that P 1 accurately depicted  
9 the area on the date of the fall.

10          MR. WILSON: I think that was unanimous by the  
11 witnesses.

12          THE COURT: So what do you want me to say, then? Do  
13 you want me to say that P 1 is much closer to the drain than  
14 Exhibit...

15               (There was a pause in the proceedings.)

16          THE COURT: In that case, I'll just say, "P 1 is the  
17 one that the testimony is more accurate."

18          MR. SKAFF: I think that's the safest thing, Your  
19 Honor, is to say that Exhibit P 1 is --

20          THE COURT: Do you agree with that?

21          MR. WILSON: Absolutely.

22          THE COURT: All right. Bring in the -- I'll just  
23 answer the question.

24               The second question is, "Do we know the date of  
25 Exhibit P 1?"

1 MR. SKAFF: There's no testimony on it, Your Honor.

2 MR. WILSON: No testimony.

3 THE COURT: Well, they saw it. Why are they asking?

4 "P 1, counsel agree, is the most accurate."

5 MR. SKAFF: I think we have to be careful, Your  
6 Honor. I think, according to the testimony, that accurately  
7 depicted -- just say, "P 1 accurately depicted the scene on  
8 the date of the accident."

9 MR. WILSON: I agree with that description.

10 THE COURT: How do you spell scene, S-C-E-N-E? I  
11 remember somebody telling me once if they judged me on  
12 spelling I would have failed in law school.

13 ...at the scene...

14 Who is the foreman? We already saw who the foreman  
15 is.

16 THE CLERK: The foreman is Roy Spargur.

17 THE COURT: Here's what I've said:

18 "P 1, counsel agree, is the most accurate picture of  
19 the scene, according to the testimony."

20 Is that satisfactory?

21 MR. WILSON: Based on the testimony, P 1 --

22 THE COURT: "P 1, counsel agree, is the most  
23 accurate picture of the scene, according to the testimony."

24 MR. SKAFF: Here's what I would suggest, Your Honor:

25 I would just say, "According to the testimony in the

1 case, P 1 accurately depicted the scene on the date of the  
2 accident."

3 THE COURT: I'm not going to send this back with the  
4 prior answer in there.

5 Okay. Now what's the agreed statement?

6 MR. SKAFF: "According to the testimony" --

7 THE COURT: "P 1" --

8 MR. SKAFF: -- "P 1 accurately depicted the scene on  
9 the date of the accident."

10 THE COURT: Okay. You-all look at this answer that  
11 we're going to send back to the jury. Look at it and see if  
12 you agree with it -- you don't have to agree with it; see if  
13 it's correct.

14 If you have trouble reading my writing, tell me. If  
15 you do, I --

16 MR. WILSON: There might be a misspelling, but I'm  
17 not going to be the one to point it out.

18 MR. SKAFF: That's fine.

19 THE COURT: Is it all right?

20 MR. WILSON: It's fine.

21 THE COURT: All right. You can take it back in.  
22 Here, let me fold it. I don't want the question taken back.  
23 It's been written all over by me.

24 File this.

25 THE CLERK: Yes, sir.

1           THE COURT: Take this back, Bob, if you would.  
2 Thank you.

3           THE CSO: Yes, sir.

4           THE COURT: Okay. We'll recess until we have  
5 another question or a verdict.

6           (A recess was taken pending the jury's verdict.)

7           THE COURT: Okay. Everyone please stand. Bring in  
8 the jury.

9           (The jury entered the courtroom.)

10          THE COURT: You may be seated. Mr. Spargur, has the  
11 jury arrived at a verdict?

12          THE FOREMAN: We have, Your Honor.

13          THE COURT: Would you hand it to Mr. Pierce.

14          (There was a pause in the proceedings.)

15          THE CLERK: Members of the jury, harken unto your  
16 verdict:

17                 In Civil Action No. 2:10cv606, Plaintiff Margaret M.  
18 Aaron v. Kroger Limited Partnership I. We, the jury, find  
19 for the defendant.

20                 Signed: Roy Spargur. Dated 1-26-2012.

21                 Members of the jury, is this your verdict, so say  
22 you all?

23                 (All members of the jury indicated in the  
24 affirmative.)

25                 THE CLERK: Thank you.



1           THE COURT: All right, ladies and gentlemen. I  
2 thank you very much. It's always difficult to arrive at  
3 conclusions in these cases, and oftentimes it gives you some  
4 consternation. However, Mrs. Aaron is a nice lady, as the  
5 defendant said, but it's just unfortunate. The store does  
6 not have to be an insurer of the safety of the people who use  
7 it. We just have to accept certain responsibilities.

8           And I appreciate your verdict, and I appreciate your  
9 service. What I did notice -- it's been a long time since  
10 I've ever seen someone quote exactly what someone said in a  
11 question that was put back to the jury, you know, that was  
12 testified to. I couldn't get over the exact quote that came  
13 in about turning the corner. I have to mention that, because  
14 in 30 years no jury has ever done that, and I just had to  
15 tell you that.

16           Everyone please rise while the jury retires.

17           (The jury withdrew from the courtroom.)

18           THE COURT: You may be seated.

19           Are you going to file a motion, Mr. Wilson?

20           MR. WILSON: I think I need to consider grounds for  
21 a mistrial based on some of the comments that were made in  
22 the presence of the jury after the instructions.

23           THE COURT: Well, you can't very well do it now  
24 because it's too late. You have to move for the mistrial  
25 when the error is committed. However, I'll allow you to file

1 a memorandum, if you desire.

2 MR. WILSON: Yeah. Or I'll just appeal it, one of  
3 the two, Judge.

4 THE COURT: All right. Anything else?

5 MR. SKAFF: No, Your Honor.

6 THE COURT: Okay. You've got ten days to file your  
7 motion, Mr. Wilson.

8 MR. WILSON: I will. And I'll consider it  
9 thoughtfully before we do so.

10 THE COURT: All right.

11 (The hearing adjourned at 3:26 p.m.)  
12  
13  
14  
15

16 CERTIFICATION

17  
18 I certify that the foregoing is a correct transcript  
19 from the record of proceedings in the above-entitled matter.  
20

21 s/s

22 Heidi L. Jeffreys

23

24 April 16, 2012

25 Date